OXFORD

Satow's Diplomatic Practice

SIXTH EDITION

Edited by Sir Ivor Roberts

SATOW'S DIPLOMATIC PRACTICE

Sixth Edition

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PREFACE

Sir Ernest Satow's *Guide to Diplomatic Practice* although first published nearly a hundred years ago remains a masterpiece. The book he wrote in 1917 was no dry collection of facts and legal terms. It was suffused with illuminating, interesting, often whimsical, anecdotes, and wise counsel. Nevertheless, when I was invited to edit the first revised edition for 30 years, I quickly realized that nothing less than radical surgery was required. For diplomacy has changed too much in its practice, if not in its essentials. Satow would find much to amaze him in the conduct of diplomacy but not in the underlying purpose. It is still 'the application of intelligence and tact to the conduct of official relations between the governments of independent states, and between governments and international institutions; or, more briefly, the conduct of business between states by peaceful means' (Chapter 1). But it would clearly be a mistake to try to cling to much in earlier editions which has now been entirely superseded. The team of contributors, a note on whom is at xxix, has been an enormous source of professional expertise, support, and consistently constructive criticism of my and each other's work. It would be invidious to single anyone out. Their respective contributions are to be found in the Note.

The last edition of this book was written 10 years before the fall of the Berlin Wall. It reads very much like a book of its time, reflecting the immediate post-war disposition and still retaining from the original Satow much of the language of traditional diplomacy. A new edition is needed to illustrate how much the world of diplomacy has changed since the last one. I concluded with regret that it would have by and large to depart from the Satow writing style to make it more contemporary and accessible to the practitioners of the twenty-first century.

We have aimed in this new edition to move the focus away from the UK and Commonwealth (in the last edition, the international organization mentioned first after the United Nations is the Commonwealth) and towards a global audience. We hope that it will be considered an indispensable vademecum in every foreign ministry, as a concise and authoritative guide for their legal advisers and diplomats, and more widely for international lawyers and students of international relations. It aims to be in effect a short primer in diplomacy as well as a guide to diplomatic practice, international organizations, and law. It also comes to terms with the fact that English is the 'new' diplomatic language. (It is striking that so many passages in the 1979 edition are in French.)

At the same time, the book reflects the way modern communications have transformed diplomacy. When the last edition came out, the phrase 'shuttle diplomacy' had just been invented and summit meetings were still a rarity. Videoconferencing was practically unknown and the Internet, although conceived of, had yet to acquire a public face. At the time communication technology seemed to stretch only to a hotline to prevent nuclear war. Hand in hand with these changes in communications has come the rise in multilateral organizations and networks which makes diplomacy at the foreign ministerial level far more frequent and accessible. First published a year before the Versailles Peace Conference, the original Satow described a world where the only way for the Great Powers to meet was at a major conference lasting weeks and in some cases months. Berlin and Vienna were perhaps the most famous of these conferences in the preceding century. The changes required to diplomatic practice by monthly meetings and weekly conversations of eg EU foreign ministers, thrice-yearly meetings of EU presidents and prime ministers, and regular meetings at ministerial and prime ministerial level in most international organizations need to be documented and the impact on diplomats' lives and work explained. At the time of writing the world is in the grip of a financial and economic crisis that shows little sign of abating. International organizations and institutions are unlikely to emerge unchanged—some may not survive. But diplomacy and diplomats will still be required. The question which the book asks, and I hope answers, is: what, in the twenty-first century, are diplomats for?

Arrangement of the Book

Turning to the detail, Book I 'Diplomacy in General' needed substantial change. The introductory chapter on diplomacy has been expanded to make it a short history of diplomacy which it is hoped will help beginners orientate themselves in the subject. We dropped a good deal of the historical material on precedence and protocol and emphasized how foreign affairs are no longer the exclusive prerogative of the minister for foreign affairs or the president/prime minister. The chapter on language and forms of diplomatic communication while aiming to be comprehensive also reflects how diplomats communicate today increasingly through email and even texting and rather fewer leisurely *Notes verbales*.

The Books on Diplomatic Agents and Consular Matters have been further broken down into four Books, one on diplomatic relations, a second on diplomatic privileges and immunities, a third on diplomatic missions, and a fourth on consular matters. Most of the material on diplomatic and consular privileges and immunities was rewritten by Eileen Denza for the last edition to reflect the

international conferences in Vienna on these subjects which had taken place in the 1960s and the resulting Conventions. No such major but a fair amount of minor revision has now been called for which she has again provided. Previous chapters on attacks on embassies and kidnapping of diplomats have been combined and expanded to reflect the growth in the scourge of terrorism and the often 'soft' target that embassies and diplomats provide. The last edition was written before the most flagrant breach of diplomatic immunity, the seizure of the US embassy in Tehran in 1979 and the detention of its staff for over a year. Since then, of course, many diplomats have been kidnapped, attacked, and even assassinated. The last edition of Satow has no entry in its index under terrorism.

As multilateral diplomacy and international organizations are at the heart of modern diplomacy, the Book devoted to them has been greatly expanded and given a higher priority in the text. The Book (VI) has substantial chapters on the United Nations and its specialized agencies and subsidiary bodies. Those dealing with economic, financial, and trade matters have now been grouped in a separate chapter which also takes in the work of the G8 and G20. The EU requires two chapters, and other international and regional organizations are incorporated in yet another (very substantial) chapter, such has been the exponential growth of these bodies. A new Book VII deals with peaceful settlement of disputes and the development of international tribunals including the International Criminal Court and the war crimes tribunals. Another new Book (VIII) covers non-governmental organizations (NGOs) and others who compete with conventional diplomats in the crowded international market place of conflict resolution. Book IX revises comprehensively, with contemporary examples, earlier material covering congresses, conferences, treaties, and other international instruments. The last chapter, Advice to Diplomats, retains some of the material from earlier editions which is timeless but has been brought into the new century with advice on modern diplomatic practice and a specific section on multilateral diplomacy. It has been important to suggest in my predecessor Lord Gore-Booth's words 'differences in atmosphere and diplomatic technique between bilateral diplomacy in a foreign capital and multilateral diplomacy'.

It is indeed our hope that enough of the original Satow has been retained to give the new reader something of its flavour while satisfying those aficionados of earlier editions. I hope that our extensive use of fresh material will entertain and instruct a new generation of diplomats, academics, students of international relations, and international lawyers and be of practical use to a wider public.

When the last edition of this book was written, Britain had never had a woman prime minister. Since then we have had one, for more than a decade, who saw foreign affairs (but perhaps not diplomacy) as being very much her domain.

Meanwhile in the US, so often a pace setter in social affairs, three of the four most recent Secretaries of State have been women. Disappointingly, as my predecessor put it, 'the English language has not yet provided a grammatically elegant way of dealing with this change. We have, therefore, used the compromise of occasionally employing the 'he (or she)' formula . . . but its constant repetition would be intolerably tedious'. For this edition, too, to avoid repetition of he/she, the male pronoun has had, very often, to serve both sexes where the plural pronoun 'they' has not been appropriate.

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April 2009

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BIOGRAPHICAL NOTE ON SATOW

Ernest Mason Satow was born at Clapton, Essex, in 1843. He was the son of a Swedish merchant who had settled in England, and an English lady, Margaret Mason. In his studies at University College, London, he read at an early stage a borrowed copy of Laurence Oliphant's *Narrative of the Earl of Elgin's Mission to China.* This aroused in him a desire to know Asia. In 1861 he came first in an examination for a student interpretership in the Far East. He was assigned to the British Consular Service in Japan.

After a short stay in Peking for Chinese studies, Satow arrived in Japan in 1862, nine years after the 'opening up' of that country by Commodore Perry to foreign presence and commerce. He found himself in the midst of the violent struggle between the partisans of the Shōgun, or chief of government, and the Emperor, which involved constant physical danger to foreign residents in Japan. The victory of the Emperor's party ushered in the great Meiji Restoration period, in which Japan, after three centuries of isolation, assimilated with incredible seriousness and rapidity skills developed during those centuries in the Western world. For over 20 years Satow's linguistic expertise, together with his adventurous travels (including shipwreck off the port of Hakodate) and his personal qualities, gave him a most remarkable position among Japanese of all backgrounds, and contributed greatly to the standing of the British Legation in Tokyo. Satow also started a family with Takeda Kane (1853–1932), his *musumé* (mistress, or common-law wife), with whom he cohabited in Tokyo from the 1870s until his departure from Japan in 1884. They had two sons, the younger of whom came to Britain to study botany some years later.

In 1884 Satow was posted to Siam (Thailand) and subsequently to Uruguay in 1888 ('nothing to do') and Morocco in 1893. But a man with a uniquely expert knowledge of both Chinese and Japanese language and civilization was bound to go back to the Far East, and Satow found himself in Tokyo (1895–1900) and Peking (1900–6), in both places as minister and head of mission. In these last two posts he performed most distinguished service, though, as the years went on, the claims and ambitions of Far Eastern and other powers took the situation out of the control of diplomacy or peaceful foreign policy.

On 25 July 1906, three months before his retirement from the Diplomatic Service, Satow was received in audience by King Edward VII. 'On my going

away,' he recorded, 'His Majesty said that my services would receive recognition. Later in the day came a notice that I was to be sworn a member of the Privy Council.' 'I value it,' he wrote to an old friend, 'more than anything else that could have been given me. It was The King's own idea.'

In 1907 Satow represented Britain at the Second Hague Conference on International Peace. For the rest of his life, he lived quietly at his home in Devonshire, devoting his time to study and writing. He died in 1929, having lived a full and fruitful life as a member of that rare calling, the Scholar-Diplomat. As H W V Temperley put it, 'He wrote various studies on international law and history, and delivered his final message in a work full of practical wisdom, legal acumen and antiquarian knowledge, entitled *A Guide to Diplomatic Practice*'.

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Sir Ivor Roberts
Oxford

ABBREVIATIONS

ACABQ	Advisory Committee on Administrative and Budgetary Questions
AJIL	American Journal of International Law
All ER	All England Law Reports
ASEAN	Association of South-East Asian Nations
AU	African Union
BBC	British Broadcasting Corporation
BFSP	British and Foreign State Papers
BYIL	British Yearbook of International Law
CENTO	Central Treaty Organization
CFSP	Common Foreign and Security Policy (of the European Union)
Cmd, Cmnd, Cm	Command Papers. (UK Parliamentary Papers which derive their name from the fact they are presented to the United Kingdom Parliament nominally by 'Command of Her Majesty'. The current series uses the prefix Cm.)
CMLR	Common Market Law Review
COREPER	Committee of Permanent Representatives (of Members of the European Union)
CSCE	Conference on Security and Cooperation in Europe
DGSE	Direction Générale de la Sécurité Extérieure
EC	European Community
ECAFE	Economic Commission for Asia and the Far East
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECLA	Economic Commission for Latin America
ECOSOC	Economic and Social Council of the United Nations. Also used to refer to the Economic and Social Committee of the EC.
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECWA	Economic Commission for Western Asia
EDC	European Defence Community
EEA	European Economic Area

EEC	European Economic Community (now the European Community)
EFAR	European Foreign Affairs Review
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ELDO	European Launcher Development Organisation
ELJ	European Law Journal
ELR	European Law Review
EP	European Parliament
ER	English Reports
ESCAP	Economic and Social Commission for Asia and the Pacific
ESDP	European Security and Defence Policy
ESRO	European Space Research Organization
EU	European Union
EURATOM	European Atomic Energy Community
EUROCONTROL	Name given to the European Organisation for the Safety of Air Navigation
FAO	Food and Agriculture Organization
FCO	Foreign and Commonwealth Office
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
GA	General Assembly of the United Nations
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
HMSO	Her Majesty's Stationery Office
HR	Académie de Droit International de la Haye Recueil des Cours
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICLQ	International and Comparative Law Quarterly
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
IFC	International Finance Corporation

ILC	International Law Commission
ILC Yearbook	Yearbook of the International Law Commission
ILO	International Labour Organization
ILR	International Law Reports (Older Reports Annual Digest and Reports of International Law Cases (AD))
IMF	International Monetary Fund
IMO	International Maritime Organization
INMARSAT	International Maritime Satellite Organization
INTELSAT	International Telecommunications Satellite Consortium
IRO	International Refugee Organization
ITLOS	Law of the Sea Tribunal
ITU	International Telecommunication Union
LR	Law Reports
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity (now AU see above)
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
OIC	Organization of the Islamic Conference
OJ	Official Journal of the European Union
OSCE	Organization for Security and Co-operation in Europe
PAU	Pan-American Union
PCIJ	Permanent Court of International Justice
QC	Queen's Counsel
RGDIP	Revue Générale de Droit International Public
RN	Royal Navy (UK)
SACEUR	Supreme Allied Commander, Europe
SHAPE	Supreme Headquarters Allied Powers, Europe
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
TEU	Treaty on European Union
TLR	Times Law Reports

UKTS	United Kingdom Treaty Series
UNCIO	United Nations Conference on International Organization
UNCTAD	United Nations Conference on Trade and Development
UNEF	United Nations Expeditionary Force
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFICYP	United Nations (Peacekeeping) Force in Cyprus
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund (1946–53 United Nations International Children's Emergency Fund: in 1953 name changed, original acronym retained)
UPU	Universal Postal Union
UNTS	United Nations Treaty Series
WEU	Western European Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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1

DIPLOMACY—A SHORT HISTORY

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Definitions

Diplomacy is the application of intelligence and tact to the conduct of official relations between the governments of independent states, extending sometimes also to their relations with dependent territories, and between governments and international institutions; or, more briefly, the conduct of business between states by peaceful means. Although the word, diplomacy, has been in the English language for little more than two centuries, it has suffered from misuse and confusion. While diplomacy is properly the conduct or execution of foreign policy, it is sometimes confused with foreign policy itself. But foreign policy is formulated by government, not by diplomats.[1] In order to carry out its policy, a government manages its international relations by applying not only persuasion but also different forms of pressure. How successful these pressures prove will depend to a great extent on the real power, often now referred to as hard power,[2] **1.1**

[1] In popular American usage, the United States Secretary of State is sometimes called a 'diplomat'. But the Secretary, though not a member of the Legislature, is essentially a member of the Administration and not of the Diplomatic Service, so that the description 'diplomat' can be misleading. A similar confusion exists elsewhere. The French frequently refer to foreign ministers as 'le chef de la diplomatie ruritanienne'.

[2] 'Everyone is familiar with hard power. We know that military and economic might often get others to change their position. Hard power can rest on inducements ("carrots") or threats ("sticks"). But sometimes you can get the outcomes you want without tangible threats or payoffs. The indirect way to get what you want has sometimes been called "the second face of power." A country may

behind them. The power must be real, but rather than exercise it explicitly, the government may prefer to keep it in reserve with the implication that in certain circumstances it could be used. Nevertheless, in normal circumstances it will conduct its international intercourse by negotiation, a form of soft power. This is diplomacy. Persuasive argument, if applied skilfully and sensitively at the right time, may achieve a better result than persuasion too obviously backed by the threat of force. The latter may provoke resistance and ultimately lead to war.

1.2 The etymology of diplomacy takes us to ancient Greece. The diplomat,[3] says Littré, is so called because diplomas are official documents (*actes*) emanating from princes, and the word 'diploma' comes from the Greek διπλωμα (διπλόω, I fold, fold double). A diploma is understood to be a document by which a privilege is conferred: a state paper, official document, a charter. The earliest English instance of the use of this word is in the year 1645[4] though the now disused form *diplome* was borrowed into English as early as 1610, when it appeared in John Donne's book *Pseudo-Martyr* (p. 20: 'If the Pope should write to any of them by the name of Sons . . . it vitiates the whole Diplome, and makes it false'). The meaning here is again 'official document'. The organization of such documents fell to trained archivists who were the first to be called diplomats, ie those who dealt with diplomas or archives.[5]

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obtain the outcomes it wants in world politics because other countries admire its values, emulate its example, aspire to its level of prosperity and openness. This soft power—getting others to want the outcomes that you want—co-opts people rather than coerces them. Soft power rests on the ability to shape the preferences of others.' J S Nye Jr, 'Soft Power and Leadership' *Compass*, Spring 2004, published by Kennedy School of Government, Harvard University.

3 Diplomats existed long before the word was employed to denote the class. Machiavelli (1469–1527) is perhaps the most celebrated of men who discharged diplomatic functions in early days. D'Ossat (1536–1604), the Conde de Gondomar (1567–1626), Kaunitz (1710–94), Metternich (1773–1859), Pozzo di Borgo (1764–1842), the first Lord Malmesbury (1764–1820), Talleyrand (1754–1838), and Lord Stratford de Redcliffe (1786–1880) were among the most eminent of the profession in their time. If men who combined fame as statesmen with diplomatic reputation are to be included, the Duc de Richelieu (Cardinal Richelieu, 1585–1642) was in a sense the father of French diplomacy; and Count Cavour (1810–61) and Prince Bismarck (1815–98) enjoyed world-wide celebrity. Outside Europe there were notable 'pioneer' diplomats such as Sir Thomas Roe, British 'lord ambassador' at the court of the Mogul Emperor Jehangir (1615–18) and Townsend Harris, the first American consul-general in Japan (1855–60) with his remarkable gift for comprehending the psychology of a long-isolated people and Dr Henry Kissinger, who served two US presidents and usually put them in the shade where foreign policy was concerned.

4 J Howell, *Epistolae Ho-Elianae*, (section ii, page 23): 'the King of Spain . . . was forcd to publish a Diploma wherein he dispensd with himself (as the Holland Story hath it) from payment'. See also *Oxford English Dictionary* (2nd edn, Clarendon Press, 1989), vol IV, 695.

5 This is still reflected in the title at Oxford University of 'professor of diplomatic'. The current holder, Professor Richard Sharpe, writes 'Oxford has had a teaching post in diplomatic since 1897. The term itself originates with the founding textbook by Dom Jean Mabillon, *De Re Diplomatica* (The Matter of Diplomas), published in 1681, in which he argued that there were criteria to judge the authenticity or otherwise of the early medieval charters in Benedictine archives. In Mabillon's

Leibnitz, in 1693, published his *Codex Juris Gentium Diplomaticus,* Dumont, **1.3**
in 1726, the *Corps Universel Diplomatique du Droit des Gens.* Both were collections of treaties and other official documents. In these titles *diplomaticus, diplomatique,* are applied to a body or collection of original state papers, but as the subject-matter of these particular collections was what we now call *international* relations, '*corps diplomatique*' appears to have been treated as equivalent to '*corps du droit des gens*,' and '*diplomatique*' as 'having to do with international relations'. Hence the application also to the officials connected with such matters. *Diplomatic body*[6] now came to signify the body of ambassadors, envoys, and officials attached to the foreign missions residing at any seat of government, and *diplomatic service* that branch of the public service which supplies the *personnel* of the permanent missions in foreign countries. The earliest example of this use in England appears to be in a satirical work *The Chinese Spy* (a translation, published in 1765, of the French work *L'espion chinois* by Ange Goudar): 'The diplomatic body, as it is called, was at this ball, but without distinguishing itself to any great advantage' (volume VI, p. 198). Burke, in 1796, speaks of the 'diplomatic body', and also uses 'diplomacy' to mean skill or dexterity in the conduct of international intercourse and negotiations. The terms *diplomat, diplomate, diplomatist* (now virtually obsolete) were adopted to designate a member of this body. In the eighteenth century they were scarcely known. Callières, whose book was published in 1716, never uses the word *diplomate.* He always speaks of 'un bon' or 'un habile négociateur'. Disraeli is quoted as using 'diplomatic' in 1826 as 'showing address (adroitness)' in negotiations or intercourse of any kind *(Oxford English Dictionary). La diplomatique* is used in French for the art of deciphering ancient documents, such as charters and so forth.

Early History

Diplomacy is in fact, as the Duc de Broglie remarked, the best means devised by **1.4**
civilization for preventing international relations from being governed by force alone. The field in which it operates lies somewhere between power politics and civilized usage, and its methods have varied with the political conventions of each age. There is no lack of evidence that the sending of emissaries to open

time many subjects were included under the term diplomatic that would not be now, including numismatics. Palaeography is dealt with separately now, but sigillography (sometimes known by its Greek name sphragistics)—the study of seals attached to documents—is still taught as part of diplomatic. The main purpose is to equip postgraduates in medieval history to deal with raw primary evidence, especially charters, deeds, and government records.'

[6] This use of the expression first arose in Vienna around the middle of the eighteenth century. (Ranke, cited by Holtzendorff, iii. 617.)

negotiations was a common practice among quite primitive peoples and that in many cases their reception and treatment were regulated, even if only in a rudimentary way, by custom or taboo. The origins may go back at least to the Great Kings of the Ancient Near East in the second and possibly even as early as the late fourth millennium, to the cuneiform civilizations of Mesopotamia. The first diplomatic document we possess is a copy of a letter inscribed on a cuneiform tablet sent around 2500 BC from the Kingdom of Ebla to the Kingdom of Amazi about 600 miles away. It was discovered in the palace archives of Ebla by an Italian archaeological team in the 1970s.[7] The Amarna letters discovered in Egypt in 1887 show us a world of quite advanced political interaction among the States of the Near East in the fourteenth century BC. But as Berridge remarks, communications in this period were slow and insecure and the means either messengers or merchant caravans. Diplomatic immunity was nothing more elaborate than the standards of hospitality of the period. By the time of the Greek city states of the fourth and fifth centuries BC a new more sophisticated diplomacy had developed.[8] The city states frequently despatched and received special embassies with due accreditation, who presented their case, sometimes accompanied by a declaration of war, openly before the rulers or assemblies to whom they were sent and relied on a recognized system of diplomatic immunity. Resident missions with local representation were also introduced whose head was known as *proxenos*.

1.5 The principles and methods of Greek diplomacy had in fact been developed by the fifth century BC into a recognized system to which much subsequent thinking on the subject owes its origin, and which has provided one of the earliest and clearest illustrations of the difficulty, so familiar to us today, of reconciling efficient negotiation with the processes of democracy. There were epic moments of diplomacy in antiquity. Nicolson highlights the celebrated Conference of Sparta in 432 BC, perhaps the first account of a diplomatic conference. The Conference was called by the Spartans to decide whether or not to go to war with Athens. However an Athenian diplomatic mission or delegation was by chance in Sparta on other unspecified business and was invited to address the Assembly and indeed to remain in Sparta even after a vote by Sparta and her allies had been taken to go to war with Athens. Clearly then it had already emerged that diplomats, as we must call these Athenian delegates, enjoyed some protection and were afforded rights which other visitors from Athens are unlikely to have been granted. Some protocol must already have been in place which governed this inchoate diplomatic procedure. Of course not all activity by these early members of a mission or

[7] R Cohen in *Innovation in Diplomatic Practice*, Jan Melissen (ed), (Macmillan, 1999).
[8] G R Berridge, *Diplomacy, Theory and Practice* (3rd edn, Palgrave, 2005) 1.

embassy can properly be designated diplomacy. To describe as diplomacy for instance the crude threats of the Athenian envoys to Melos during the Peloponnesian war in exhorting them to surrender to Athenian rule—'the strong do what they can and the weak suffer what they must'[9]—whatever its modern resonances—would be to sell the craft of diplomacy short.

1.6 The Roman contribution to this heritage was characteristic of a people who produced rulers and administrators rather than diplomats, who preferred organization to negotiation, and who sought to impose a universal respect for their own system of law. Yet while their behaviour was often brutal and oppressive, as was perhaps not surprising in the only superpower of their day, they were not entirely without scruple. When one Roman embassy to King Perseus of Macedon duplicitously gulled him into delaying his preparations for war by suggesting that a deal could be struck at Rome, the envoys were criticized by some Romans for their cynical behaviour.[10]

1.7 The Byzantine emperors, on the other hand, although often at pains to elaborate the machinery of diplomatic intercourse, earned this machinery a reputation for complexity and deviousness. And yet as the Byzantine emperors attempted to compensate for their reduced military force by the use of diplomacy, the ceremonial of which was notably ornate, they developed the ancient concept of divide and rule, playing off one group of barbarians against another,[11] often bribing the frontier tribes.[12] They transformed the traditional role of the envoy from a herald or orator who simply set out the emperor's views, threats, or proposals to the beginnings of the role of the modern diplomat, a trained observer and negotiator attempting to interpret what he saw for his master and to negotiate an accord which approximated most closely to the empire's interests. Their success in attracting pagans into the Christian orbit was another means of protecting the empire.

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9 Thucydides, *The Peloponnesian War.* Translation by Richard Crawley, *The Landmark Thucydides*, Robert Strassler (ed), (Simon and Schuster, 1998) 352.

10 R Lane Fox, *The Classical World: An Epic History from Homer to Hadrian* (Allen Lane: London, 2005) 327.

11 H Nicolson, *Diplomacy* (3rd edn, OUP: London, 1963) 25.

12 Professor T L Hodgkin, in a lecture entitled 'Diplomacy and Diplomats in the Western Sudan', made the following comments about non-resident diplomacy in Arab North Africa from the tenth to the fourteenth centuries:

(i) 'Most of these embassies would fall, so far as their ostensible object was concerned, into the category which Mattingly [see footnote 12], following and adapting Bernard du Rosier, calls "embassies of ceremony", to bring presents and letters of congratulation to a Prince on accession or after conquests, to renew friendship, etc.'

(ii) 'At the same time, from a more practical standpoint, in most cases these embassies also presumably fall into Mattingly's other category as "embassies of negotiation."' (Quoted from K Ingham (ed), *Foreign Relations of African States* (London, 1974), 9.)

1.8 The Venetians undoubtedly learned much from Byzantine example and it was through them that Byzantine diplomatic practice was passed on to the West, but the diplomacy of the Italian city states was essentially a product of the political conditions of the time. As the late Garrett Mattingly[13] demonstrated, Italian Renaissance diplomacy did not spring either from a Greek prototype or ready-made from Italian soil. According to his interpretation the Western and Central European world based itself on the triple concept of the Roman Empire and its tradition of civil law; its successor, the Holy Roman Empire, with its system of Germanic feudal and customary law; and the canon law of the ecclesiastical authority. The centre of faith was the Church of Rome, and the centre of doctrine, the Papacy. The whole formed what was termed the *res publica Christiana.* So long as this trinity formed a credible unity, although of course emissaries (whether styled as agents, procurators, or consuls) were sent to transact business in territories other than their own, there was no formal necessity for accredited ambassadors (*legati*) in the sense in which we understand the term today; and certainly not for resident ones. In fact the thirteenth century canon law authority Gulielmus Durandus gave the definition 'a *legatus* is anybody sent by another'.

Renaissance Diplomacy

1.9 Nevertheless, as the Middle Ages proceeded, there was rarely concord between Pope and Emperor; the sovereignty of individual states grew as walled cities found they could defend themselves against quite large imperial or papal forces, and credentials of some kind began to be required if an ambassador was to be received by someone regarding himself as holding sovereign power. Even so, growth was by no means logical or tidy and the move to residential diplomacy is hard to identify with precision. While there were isolated examples—for instance the papal representative at the emperor's court in Constantinople, who was called the 'apocrisiarius', often held the post for a number of years—Gregory the Great held it from 578 to 585, before becoming Pope in 590[14]—the institution of a resident embassy seems to date from the second half of the fifteenth century. Outstanding among early long-term resident diplomatic agents was Nicodemo da Pontremoli, sent by Francesco Sforza, ruler of Milan, not in the first place as his representative to the Florentine State, but as his confidential agent to Cosimo de' Medici, its most powerful citizen. When in 1450 Sforza became Duke of Milan, he furnished his representative with a regular accreditation as 'orator' in

[13] G Mattingly, *Renaissance Diplomacy* (London, 1955) chs I–II.

[14] The current editor is indebted to Professor Larry Siedentop for drawing his attention to this example.

the Florentine republic, and Nicodemo held the post for 17 years. One can readily see how in the closely knit but tensely divided polity of fifteenth century Italy the practice of residential diplomacy, the most important innovation in diplomatic practice, came to be commonly accepted and to evolve its own conventions. It was during the Italian Wars (1494–1559)[15] that the practice spread around Europe, not least because the Italian princes and popes needed good intelligence on what was being planned in terms of their own future in the capitals of the countries most prone to intervene in Italy: Paris, Madrid, and Vienna. In the atmosphere of developing nation states, shifting alliances, and the dynastic struggles for power the resident diplomatic agent was invaluable in keeping his master supplied with information and acting as a barometer to register every evidence or portent of impending change.[16] A quarter of a century later 'the earliest major work on diplomatic law'[17] appeared. It was written by Alberico Gentili, a Protestant from Le Marche, who fled from the Italian inquisition to find refuge in Queen Elizabeth's Protestant England in 1580 and became Regius Professor of Civil Law at All Souls' College, Oxford seven years later. His book *De Legationibus Libri Tres* (1585)[18] discussed, inter alia, the inviolability of ambassadors and the establishment and conduct of diplomatic missions. Gentili also pointed out what might seem surprising for the time: that it was already common to accept ambassadors from states considered by the receiving State to be infidels or heretics. In this he will have been prompted by the fact that only two years before *De Legationibus* was published 'England's first permanent embassy to the Muslim empire of the Ottoman sultan was created in Istanbul, where it joined two other Christian embassies . . . those of Venice and France'.[19] However, the wars of religion in the sixteenth and seventeenth centuries so embittered relations between Catholic and Protestant States that for 100 years true diplomacy was well-nigh paralysed by mutual distrust. Ambassadors reported that it was impossible to find out anything, because nobody wanted to talk to them. Christendom appeared to be breaking up and the civilized intercourse essential to good diplomacy suffered a temporary lapse. This very much applied

15 A series of wars originally dynastic but later descending into a general power struggle for territory and control involving most of the Italian city states, the Papal States, and the major European actors.

16 D Frigo (ed), *Politics and Diplomacy in Early Modern Italy* (Cambridge University Press, 2000) 8–9 and 27–31.

17 E Lloyd, 'The Development of the Law of Diplomatic Relations', *British Yearbook of International Law*, vol 40 (1964) 149.

18 A Gentili, *De Legationibus Libri Tres.* Translated by G L Laing, Classics of International Law (Oxford and New York, 1924; reprinted New York and London, 1964).

19 G R Berridge, 'Grotius' in G R Berridge, Maurice Keens-Soper, and T G Otte, *Diplomatic Theory from Machiavelli to Kissinger* (Palgrave, 2001).

to relations between Catholics and Protestants though channels of communication were still open within the opposing camps.

1.10 It was during this period that the 'Machiavellian' expedients of spying, conspiracy, and deceit brought the reputation of the resident diplomatic agent to its nadir. *Raison d'état* or what in English is called 'the end justifying the means' took unquestioned precedence over morality. The French were early leaders in this field, preferring to work with the Ottoman Turks at the expense of their fellow Christian Habsburgs. Another example of this cynical behaviour, particularly notable as it was practised by a prince of the Church, was the work of Cardinal Richelieu of France who saw his country's interests as better served by siding with the Protestants in the Thirty Years War (1618–48) than allowing the Holy Roman Empire to extend its borders further and so weaken Louis XIII's France. Richelieu was only content when his monarch was as powerful, if not more so, than the Holy Roman Emperor however offensive this was to the universalist tradition of the superiority of morality over expediency. No wonder Pope Urban VIII is said to have commented on hearing of Richelieu's death, 'If there is a God . . . Richelieu will have much to answer for. If not . . . well, he had a successful life.' [20] Richelieu was of course providing an early example of balance of power politics which were to underpin European diplomacy until the First World War. He was also among the first (in his *Political Testament*) to call for 'total diplomacy', in other words, a wide network of diplomatic representation to reflect the fact that most of Europe was intimately interconnected.[21]

The Origins of Modern Diplomacy

1.11 Only in 1648 when the Treaty of Westphalia—which concluded the Thirty Years War—had established a new order of relationships, however precarious at first, could the age of classical European diplomacy (the direct origin of all modern diplomacy) be said to have begun. An observer at that Congress wrote a guide to the diplomatic practice that emerged from it, in some ways an antecedent to the present volume. Abraham de Wicquefort wrote *L'Ambassadeur et ses Fonctions* in prison and published it in French in 1681. Wicquefort's work identifies 'the resident ambassador as the principal institutional device for the conduct of foreign affairs' as Maurice Keens-Soper remarks, and his work provides 'an actualized concept of the seventeenth-century European states-system . . . at the time

[20] L Auchincloss, *Richelieu* (New York: Viking Press, 1972) 256.

[21] 'J'ose dire hardiment, négocier sans cesse ouvertement en tous lieux, quoiqu'on n'en reçoive pas un fruit présent, et celui qu'on peut attendre à l'avenir ne soit pas apparent, est une chose tout à fait nécessaire.' Cardinal Richelieu, *Testament Politique* (ed. Paris, 1947) 347.

of the Congress of Westphalia . . . [which] set the seal on the transformation of a long divided Christendom into the states-system of the *ancien régime*'.[22] This was diplomacy conducted by members of an avowedly ruling class, who frequently had more in common with each other, across land and sea frontiers, than with the majority of their own people. (The system's elitism helped of course to foster the cohesion of the diplomatic corps.) It proceeded, like the limited wars of the time, according to well-defined rules and civilized conventions. It was personal and flexible, and its style, while not without subtlety, was clear enough for all who took part in it to understand not only what was explicitly said, but what was to be taken for granted. An important contribution to writing on relations between States came from a Swiss lawyer, Emmerich de Vattel, who discussed the application of natural law to international relations in his treatise *Le Droit des Gens* of 1758. The authors of the American constitution were influenced by it, particularly by its focus on liberty and equality, which were echoed in the Declaration of Independence, but also by its defence of neutrality. Vattel too, in discussing the right of maintaining embassies so 'that each Nation possesses both the right to negotiate and have intercourse with the others, and the reciprocal obligation to lend itself to such intercourse',[23] reflected the spirit of the age in his view of embassies as an essential element in the functioning of international society.[24]

1.12 It was however the Congress of Vienna which codified more concretely the new world of diplomacy. Its *Règlement* of 1815 established an agreed basis for diplomatic representation including precedence (see also Chapter 4) and effected the recognition of diplomatic services as a distinct profession within the public service governed by its own internationally accepted codes. The settlement at the Congress of Vienna[25] was remarkable in rebuilding an international order broken by the Napoleonic wars. Europe enjoyed its longest sustained period of peace when, from 1815 to 1914, with the exception of the Crimean War, no general war took place among the major protagonists of the Napoleonic Wars, the so-called Great Powers. It did so by constructing a balance of power which was subtle enough to ensure that the threat from French expansionism was contained, yet in a way which was not sufficiently punitive to lead to France resentfully nursing a grievance. Indeed France was rapidly admitted (in 1818) to

[22] G R Berridge, Maurice Keens-Soper, and T G Otte, *Diplomatic Theory from Machiavelli to Kissinger* (Palgrave, 2001) 89 and 99–100.

[23] E de Vattel, *The Law of Nations*, vol 3, 1758. Translated by C G Fenwick (Washington, 1916), Book IV, Chapter V, 362.

[24] See also Chapter **8**, paragraph **8**.2.

[25] For a recent full account of the Congress see A Zamoyski, *Rites of Peace: The Fall of Napoleon and the Congress of Vienna* (London: Harper Perennial, 2008).

the Congress system which was to prove a form of proto-European government for the period up to the Crimean War. The British were uneasy at any 'system' which might drag them into continental engagement but the Concert of Europe, as this Great Power system of consensus became known, survived as a concept throughout the nineteenth century and was invoked by Gladstone as late as 1879 during his Midlothian campaign as a principle to be maintained. 'And why? Because keeping all in union together you neutralize and fetter and bind up the selfish aims of each.'[26] Something of the same logic underpinned the creation of the European Communities 70 years later after the Second World War. One of the key documents to emerge from the Congress of Vienna was the Quadruple Alliance of Great Britain, Austria, Prussia, and Russia designed to counteract any nascent French aggression with overwhelming force. As Henry Kissinger comments, 'Had the victors convening at Versailles made a similar alliance in 1918, the world might never have suffered a Second World War'.[27]

1.13 In post-revolutionary Europe the ascendancy of new objectives began to eclipse earlier values. Acceptance of an established monarchical order gave way to the growing will to overturn the status quo. The international struggle for power brought into play collective national energies which could be more effectively harnessed by constitutional methods and cabinet government than by the rule of Machiavelli's idealized 'Prince'. Although skill in the classical methods continued to command respect and acceptance, it became evident that diplomacy should now be exercised (or at least appear to be exercised) in the interests, not of a dynasty, nor even of an aristocracy, but of the nation as a whole. Much of this arose from statesmen's realization of the importance of public opinion. Two British statesmen, Canning and Palmerston, thought this a positive rather than a negative development. Nicolson reminds us that '[i]t was mainly for this reason that Metternich described him [Canning] as "a malevolent meteor hurled by divine providence upon Europe"'.[28] Palmerston took an excessively optimistic view: 'Opinions, if they are founded in truth and justice, will in the end prevail against the bayonets of infantry, the fire of artillery and the charges of cavalry'. This proved as much a fallacy in Palmerston's time (Prussia in Schleswig-Holstein) as in the last hundred years. Public opinion failed to prevent wars as disparate as the two World Wars, Vietnam, and Iraq though in the case of the latter two it undoubtedly played a role in bringing the wars to an end.

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[26] Extract from Gladstone's third Midlothian Speech, Tuesday 27 November 1879 at West Calder. <http://www.liberalhistory.org.uk/item_single.php?item_id=31&item=history>.

[27] H Kissinger, *Diplomacy* (London: Simon and Schuster, 1995) 83.

[28] Nicolson, *Diplomacy*, 73.

The End of the Concert of Europe

1.14 The First World War was of course the death knell of the Concert of Europe. In truth it had been expiring for 20 years. The system of bipolar military alliances (uncannily mirroring the two power blocs that emerged with the Cold War), which had developed in the last decades of the nineteenth century, exposed Europe to the risk that a single incident could prompt a chain reaction leading to a general war. The rise of Prussian, then German, militarism became the threat which by the end of the nineteenth century had entirely replaced a similar fear of French expansionism a century earlier. The system of alliances and the excessive weight given to military planning and timetables undermined any chance that diplomacy might head off what came to be seen as an almost inevitable clash. Along with the disappearance of old Empires and much of the old order, the First World War also brought an end to old or orthodox diplomacy. The new diplomacy which was to replace it was usually vaguely defined but was clearly predicated on a new openness born of faster communications, the increasing power of the press, and a shift in the balance of forces in the democracies from the ruling elites to the governed.

1.15 Both before and during the war, the conviction asserted itself that the time was ripe for diplomacy to be made more open and more accessible to public scrutiny and appraisal. Diplomats like the Cambon brothers, respectively ambassadors in London and Berlin at the outbreak of the war, articulated this demand as early as 1905[29] as did various pacifist and other anti-war groups. As the cost of the war in terms of millions of dead became clear and as its origins were seen to lie in the failures of the old diplomacy, so the requirement for a new approach became more insistent. The clamour was heard for 'open covenants openly arrived at' in President Wilson's much quoted words. It was natural that electorates claiming to control governments should require to know what agreements were being made in their name and to exercise the constitutional right of accepting or rejecting them (as when the United States Senate in 1919 rejected participation in the League of Nations). Nowadays the openness of agreements is, in principle, guaranteed by the United Nations rule that all agreements concluded by Member States must be registered, and their texts deposited, with the secretary-general.[30] But the problem is that if negotiation is carried on under the public eye—as President Wilson at first appeared to think it should be—it quickly turns into a travesty of efficient procedure and runs the risk of betraying any constructive

[29] Ibid, 137.
[30] Article 102 of the United Nations Charter.

purpose for which it may have been conceived. By its nature, true negotiation must be confidential. If exhibited, it degenerates into polemic; and this is not diplomacy, it is the continuation of warfare in peacetime by other means. A neat corroboration of this was furnished by Soviet Field-Marshal Shaposhnikov's paradox: 'If war may be said to be the continuation of politics by other means,' [an allusion to the doctrine of Clausewitz] 'then peace, in its turn, is no more than the continuation of conflict by other means'.[31] There is of course nothing new in this. The same thought is implicit in Machiavelli's prologue to his *Art of War.* In such a process of conflict the practice of diplomacy must be presumed to embrace not merely negotiation, but the use of a complex range of moral and psychological weapons. Indeed when Wilson came to negotiate the Treaty of Versailles he clearly abandoned this transparency, the first of his celebrated Fourteen Points (America's war aims, formulated by Wilson before Congress in January 1918), and maintained confidentiality even from lesser allies. All the key decisions were taken by the triumvirate of Wilson, Lloyd George, and Clemenceau (with the Italian Prime Minister, Vittorio Orlando, the largely ineffective other member of the key body, the Council of Four) who paid scant regard to the views of others. This may be considered an early example of summitry (discussed further below) though the original intentions in assembling such a substantial cast list were very different.[32] The Germans and their allies were, unlike the French at Vienna, completely excluded, as were the Russians. To have excluded the two strongest nations in continental Europe was alone enough 'to have doomed the Versailles settlement'.[33]

The League of Nations

1.16 The failings of the Treaty of Versailles have been discussed exhaustively and this is not the place to rehearse them further. But in one area at least it provided the germ of an idea which after a false start would take root. The new diplomacy had, beyond its requirement for openness, a yearning for an international organization to settle disputes and deter those who sought to impose their will by force. In its faltering steps towards world government (the League of Nations), the Versailles Conference changed the nature of diplomacy decisively even if another World War had to intervene before this became apparent. The League of Nations was first proposed—ironically given Britain's obsession hitherto with balance of

31 Quoted by Garthoff in *La doctrine militaire soviétique* (Paris, 1956) 4.

32 For the best recent account of the Versailles Conference see M Macmillan, *Peacemakers* (John Murray, 2001).

33 Kissinger, *Diplomacy*, 231.

power politics—by the British Foreign Secretary, Sir Edward Grey, to President Wilson's personal adviser, Colonel House, as far back as 1915. Wilson made the idea his own and presented it first in May 1916. It then became one of his Fourteen Points, and Wilson pursued the idea at Versailles with characteristic eloquence and vigour.

1.17 But the League was emasculated by the US failure to ratify the Treaty and by the non-participation of Germany (excluded till 1926, and then withdrawing in 1933) and Soviet Russia (which was a member only for the years 1934–9, when it was expelled). Its limitations were demonstrated by its failure to impose sanctions on Japan in 1931 after its invasion of Manchuria, its response to Haile Selassie's famously pathetic and personal plea to the League for justice and assistance (equally pathetic), and its failure to act when Hitler occupied the Rhineland, in direct contravention of the Versailles Treaty. Collective security, the very purpose of the League, was hopelessly undermined. The failure of the League to prevent the slide into the Second World War as Hitler and Mussolini treated it with rank contempt marked the temporary eclipse of the new diplomacy. The alliances and pacts, the territorial acquisitiveness, and the suppression of self-determination, all features of the old order, returned with a vengeance. Once the war was over, however, there was a clearly recognized need to create a new international organization to replace the League and to be significantly different in its basic design.

The Cold War, Containment, and Détente

1.18 The shape of the post-war world was however not set by a world forum but by a series of summit meetings of the three Allied leaders, Roosevelt, Stalin, and Churchill at Tehran and Yalta and of Truman, Stalin, and Churchill then Attlee at Potsdam. Churchill foresaw that Stalin, the ultimate apostle of *Realpolitik* would never trade the Red Army's gains for abstract principles and proposed instead that each of the Allies should have its sphere of influence. This was anathema to Roosevelt as a return to discredited balance of power and colonial politics which US public opinion would never support. Roosevelt, who famously described the Soviet leader as having something of a Christian gentleman about him, did not live to see the final unmasking of Stalin's bad faith as he took as his sphere of influence the whole of Eastern Europe and Germany to the Elbe. Thus, until the fall of the Berlin Wall and the collapse of the Soviet Union in 1989, new and old diplomacy coexisted. East and West were grouped in two mutually antagonistic alliances while a new world body, the United Nations, struggled to fulfil its potential. The West attempted to deal with the Soviet Empire and Communist China by a policy of containment which lasted 40 years. Containment as a policy

was first articulated by the American diplomat George Kennan. In what became known as the 'Long Telegram', Kennan brilliantly analysed Soviet motives and political perspective: they were, he said, an unholy combination of Communist ideology, traditional Russian insecurity, and Tsarist expansionism. To deal with this threat, the West needed 'a policy of firm containment, designed to confront the Russians with unalterable counter-force at every point where they show signs of encroaching upon the interests of a peaceful and stable world'.[34]

1.19 But containment was very much a policy for the long haul, reactive and predicated on the eventual collapse or transformation of the Soviet system. The Communist threat was not of course monolithic. When the US began to take advantage of the ideological split between the two Communist mammoths, the Soviet Union and China, in the early 1970s, President Nixon demonstrated his attachment to old balance of power politics by daringly opening up US contacts with Communist China and providing a triangularity among the three major nuclear Powers which had hitherto been absent. At the same time Nixon initiated the policy which became known as *détente*[35] with the Soviet Union. For Kissinger, the architect of this and so many other aspects of Nixon's foreign policy, 'détente, desirable though it was, could not replace the overall balance of power'.[36] In other words, it flowed from equilibrium and was not a substitute for it. This Sino-Soviet-US geostrategic triangle with the US in pre-eminent position was, as Otte points out, 'precisely the kind of policy for which he [Kissinger] had praised Metternich and Bismarck in his earlier academic writings'.[37] In fact while Kissinger's conceptual approach to diplomacy was traditional, his practice was highly innovative. Given the limitations of nineteenth century means of transport, neither Metternich nor Bismarck would have been able to follow Kissinger's practice of diplomacy even if they had wanted to. But Kissinger's use of back-channel and shuttle diplomacy were remarkable. Kissinger as an academic had always been allergic to bureaucracy. His and Nixon's institution of back-channels, early on in the latter's presidency, stemmed from the need for secrecy both to prevent their radical foreign policy initiatives being undermined by State Department leaks and to ensure that opposition to his enthusiasm for linkage, negotiating on a broad front, was stymied. Kissinger himself put it more prosaically. His use of back-channels was designed to open up potentially blocked channels without completely sidelining the State Department. Once the back-channels 'gave hope of

34 'X' (G F Kennan), 'The Sources of Soviet Conduct', *Foreign Affairs*, vol 25, no 4, 581.

35 An easing of tension between the two opposing post-World War II blocs by use of diplomacy and confidence-building measures.

36 T G Otte, 'Kissinger' in G R Berridge, Maurice Keens-Soper, and T G Otte, *Diplomatic Theory from Machiavelli to Kissinger* (Palgrave, 2001) 195.

37 Ibid, 196.

specific agreements, the subject was moved to conventional diplomatic channels. If formal negotiations there reached a deadlock, the Channel would open up again.'[38]

Kissinger used back-channel or secret diplomacy extensively in his time as US National Security Adviser, initially to implement the policy of détente with the Soviet ambassador in Washington, Anatoly Dobrynin, through what 'Kissinger called "the Channel" used over and over again . . . on every key problem in Soviet-American relations'.[39] Later he used a back-channel with Le Duc Tho of North Vietnam in an attempt to bring the Vietnam War to an end. Kissinger added a new word to the diplomatic lexicon in being an early proponent of shuttle diplomacy, whereby the intermediary in a conflict shuttles backwards and forwards repeatedly between the parties in conflict or in dispute to secure the desired result. Of course this type of diplomacy is not guaranteed to succeed, as General Alexander Haig found when attempting to mediate between Argentina and Britain during the Falklands War in 1982, but Kissinger's style and energy often secured results, on occasions because he had worn down the resistance of the opposing sides. As Hamilton and Langhorne put it, 'his mediation in the wake of the [1973] Yom Kippur War constituted a dazzling display of how modern technology could be harnessed to a diplomacy which was at once spectacular, secret and ministerial'.[40] **1.20**

Multilateral Diplomacy

Although Kissinger's theory and practice of diplomacy were highly individualistic and born partly out of impatience with traditional bureaucratic diplomacy, another form of diplomacy has flourished in the post-war period. The multilateral approach has become increasingly common post-1945. Such a practice can be said to have its roots in antiquity. In an attempt to stop the feuding and warfare, the principal Powers in the Eastern Mediterranean, ie the important Greek states and Persia, 'agreed to convene great international political congresses . . . to discuss a general settlement of outstanding issues'. This general peace, known as the King's Peace, involved eight congresses between 392 and 367 BC and 'not only established a territorial stalemate, with guarantees against an aggressor similar to those which later figured in the Covenant of the League of Nations . . . they **1.21**

38 H Kissinger, *The White House Years* (Boston and London, 1979) 138.

39 W Bundy, *A Tangled Web*, *The Making of Foreign Policy in the Nixon Presidency* (London and New York: I B Tauris, 1998) 57.

40 K Hamilton and R Langhorne, *The Practice of Diplomacy* (London and New York: Routledge, 1995) 226.

also agreed on certain general principles . . . and on detailed practical rules of conduct for regulating international affairs'.[41] In modern times, large-scale conferences took place infrequently in the eighteenth and nineteenth centuries (Vienna and Berlin being major examples from the nineteenth century). In the twentieth century, the Versailles Conference set a precedent which has been followed ever more frequently since the Second World War despite the view of some sceptics who see such conferences as largely talking shops. (Paul Cambon believed that 'a conference which includes more than four or five people . . . can achieve nothing worthwhile'.)[42] This view has its adherents but there can clearly be advantages to a multilateral conference in terms of efficiency and speed of decision-making. This does not necessarily apply to a standing multilateral conference like the UN or other international organizations which are not time-limited. But a conference will almost certainly be the best forum for decision-making and reaching agreements where it has a deadline, is subject-specific, and/or where technical details are involved and the national experts assembled in one place. Berridge points out that multilateral conferences, particularly major standing ones like the UN, provide an opportunity for principals to meet in the margins to discuss other issues including bilateral ones, a particularly valuable opportunity for those states which have no or very poor diplomatic relations. They can also 'kick start a series of essentially bilateral negotiations that subsequently develop elsewhere. This was the extremely valuable function performed for the Arab-Israeli bilateral talks by the Geneva Conference of December 1973 and then by the Madrid Conference in October 1991.'[43] The proliferation of international and regional organizations so prevalent in the 1960s and 1970s (partly a function of the greatly increased number of independent states who saw in these organizations an opportunity for exerting influence) has levelled off now. But multilateral diplomacy's advantages will ensure that it survives despite the frequent echoes of Cambon's put-down. (Multilateral diplomacy and international and regional organizations are discussed extensively in Book VI below.)

Summitry and Modern Diplomacy

1.22 Both bilateral and multilateral diplomacy can be and frequently are carried out at the highest, that is to say at summit, level. An important definition is that of David Dunn who emphasized that they were meetings between those who 'by

41 A Watson, *Diplomacy: The Dialogue between States* (Methuen, 1982) 87.
42 J-F Blondel, *Entente Cordiale* (Caduceus Press, 1971) 40.
43 Berridge, *Diplomacy*, 155.

virtue of their position . . . are not able to be contradicted by any other individual'.[44] The word 'summit' was first used to describe meetings at this level in a speech in 1950 by Churchill ('a parley at the summit') but the practice, like multilateral diplomacy itself, has ancient roots. In the Middle Ages most diplomacy was carried out at summit level, often by kings and princes of neighbouring States. As the practice of resident diplomats became established in the sixteenth century, so summitry went into relative decline. As Geoffrey Berridge points out this was not just because of resident missions 'but because meetings between princes had in fact rarely proved fruitful; they were also dangerous'.[45] (A visiting sovereign if recognised as such would of course enjoy immunity.)[46] The practice enjoyed a renaissance in the nineteenth century and 'underwent a resurgence after 1914, fostered by the democratisation of diplomacy and the belief that issues of war and peace were too important to be left to professionals'.[47] The speed of international travel has seen the practice mushroom in the last 30 years. For some this has been the end of diplomacy, as the makers of foreign policy take it upon themselves to execute it. But that is a superficial assessment to which we shall return. Summits as originally conceived by Churchill were infrequent and involved only a handful of the most important people on the planet. The practice is now so widespread that it is possible to identify different types.[48] The first category is the serial summit, which is part of a regular institutionalized series, examples of which are the European Council, G7/G8 meetings, ASEAN, Arab League, Commonwealth Heads of Government (CHOGM), and Franco-German summits. Details of these will be found in Chapters 25 and 28. As can be seen many of these are linked to international organizations and can constitute a court of highest appeal when disagreements between members cannot be resolved at a lower level. The second type of summit is an ad hoc summit often set up to deal with a crisis or break the ice between States whose relations have been poor or non-existent. The meeting in Paris in 1971 between Heath and Pompidou which led the way to British entry into the EEC or Nixon's meeting with Mao in Beijing in 1972 were prime examples. Although the substance is often important, the symbolism of the meeting itself may be even more significant and it will undoubtedly tend to attract more publicity than a serial summit. The last kind is the high-level exchange of views. This least ambitious type of summitry is nevertheless extensively used, particularly by leaders undertaking a tour of a region. They may hope

[44] D H Dunn, *Diplomacy at the Highest Level* (Basingstoke: Macmillan, 1996) 17.
[45] Berridge, *Diplomacy*, 174.
[46] See Chapter **2**, paragraph **2**.2.
[47] J W Young, *Twentieth-Century Diplomacy* (Cambridge University Press, 2008) 115.
[48] Berridge, *Diplomacy*, 180.

to get to know their opposite number however superficially and may be able to advance some issues which have been blocked.

1.23 The dangers of summitry are not always appreciated by its practitioners. Being high-profile events, expectations of them are often raised and the risk of failure greater. As Dean Acheson, the former US Secretary of State said, 'When a chief of state . . . makes a fumble, the goal line is open behind him'.[49] Personal chemistry may work to make the occasion a success but if the chemistry works to repel rather than attract the results will at best be meagre and the process best left to the diplomat to pursue. Sometimes they can be dominated by ceremonial and appear to be more exercises in publicity-seeking, all froth and no substance, than breakthroughs in diplomatic negotiations. The most successful summits are those which have been meticulously prepared, a requirement where the professional can be expected to come into his own. Whatever their shortcomings, summits and the accompanying media circus are now a permanent feature of diplomatic topography. The diplomat must learn to exploit a summit as an opportunity to buttress his own efforts and not to view it as an occasion which will diminish his own authority.

1.24 If a diplomat no longer has a controlling monopoly in carrying out diplomatic tasks, part of the competition now comes not just from presidents, prime ministers and other ministers in terms of direct contact with the leaders of the country to which he is accredited, but from paradiplomacy and track two diplomacy, (track one being the traditional work of and by professional diplomats). Track two diplomacy is always effected by unofficial and often informal non-governmental actors. Examples include non-governmental organizations (NGOs), humanitarian organizations (eg Médecins sans Frontières), religious institutions (eg the Sant'Egidio community), academics, former government officials (eg the Carter Center), and think tanks, among others. (Track two diplomacy is discussed further in Chapters 32 and 33.) Paradiplomacy can involve actors from subnational or sub-state bodies such as the Canadian provinces, the Australian States, the Basque country, Catalonia, or the Scottish and Welsh executives. Track two actors who assist, support, and complement the work of traditional diplomats may also be described as paradiplomats. But many track two actors may be in conflict or competition with national representatives.

[49] Acheson also reflected on the difficulties caused by open or what he called 'new mass' diplomacy. 'The basic anomaly that struck one was the vast separation that existed between the few with the responsibility and capability for taking whatever action might be necessary and the many not only willing but eager to prescribe what that action should be and how it should be managed.' D Acheson, *Present at the Creation*, 1969 (New York: WW Norton and Co) 704.

1.25 If the diplomat has to compete in such a busy market place, has the role of a diplomat been superseded, rendered superfluous? Certainly if the marketplace of diplomacy has become busy, it has also expanded. The 1960s and 1970s saw a growth linked to the decolonization process. But the collapse of communism and the continuing vigour of nationalism also gave rise to a substantial expansion in numbers of independent states in the last 20 years. No independent state feels it has truly reached that status unless it has a network of diplomatic missions to fly its new flag in foreign countries and at the United Nations. The growth of international organizations and the need to staff them has also contributed, as has the broadening of many embassies' remit to take in work in economic and trade spheres while traditional consular sections and consulates have had to deal with an exponential growth in world tourism and immigration. While summitry has on occasions displaced the ambassador from prime position 'even the most energetic leader could not be in two or more places at once. Prime ministers and special envoys relied on ambassadors to pave the way for successful visits abroad, just as foreign ministers needed embassies to keep them informed about other countries' negotiating positions ahead of multilateral talks.'[50] A distinguished British diplomat, Christopher Ewart-Biggs, who was assassinated in Dublin by the IRA, wrote of the Paris embassy's support for an EEC summit '. . . one doesn't reach the Summit without a base camp. The base camp was this Embassy.'[51] It is the modern diplomat's task to man that base camp and occasionally perhaps to bask in the reflected glory of those who reach the summit. Less glamour than in diplomacy of old but no lack of fulfilling tasks to execute.[52]

[50] J W Young, *Twentieth-Century Diplomacy*, 227.

[51] J Ewart-Biggs, *Pay, Pack and Follow* (Weidenfeld and Nicolson, 1984) 161.

[52] For a regularly updated discussion of the theory and practice of diplomacy, see <http://grberridge.diplomacy.edu/>.

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2

THE STATE, THE HEAD OF STATE, AND MINISTERS

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The State as a Legal Person under International Law

Under international law a State is a legal person with legal rights and obligations. **2.1**
As such a legal person the State is to be distinguished from other corporate entities, whether established by internal law such as a commercial multinational company, or by international law such as an international organization. Although a State's annual budget and economic resources may be far less than a multinational company, the status of a State is not conferred by national laws, although the constitutional law of its own internal national legal system may allocate and determine the manner of the executive, judicial, and legislative powers which it exercises. Its status is based on the exercise of effective control over a population within a defined territory which has been recognized and given effect in international law; and it is international law which determines its capacity as a legal person, its competence, and the nature and the extent of certain rights and duties. These attributes of States distinguish them from international organizations which, although also enjoying legal personality under international law, have no population or territory, and derive their legal personality and powers in international law from treaty and the function which the particular organization is created to perform.[1]

[1] See Chapter **21**.

The Privileges and Immunities of the State

2.2 It has been well established for many centuries in customary international law that a sovereign, or head of state, when present in the territory and at the invitation of another sovereign is entitled to wide privileges and to ceremonial honours appropriate to his position and dignity, and to full immunity from the criminal, civil, and administrative jurisdiction of the State which he is visiting.[2] Watts explains well this early relationship between the head of a State and the State itself: 'Until the French revolution ushered in the modern era of republics, the states which were the active participants in the international community which gave rise to modern international law were monarchies whose rulers were regarded as possessing personal qualities of sovereignty. In many respects the state could almost be seen as the property of the ruler, and it was to a considerable degree the ruler's personal attributes of sovereignty which gave his state the quality of being a sovereign state, rather than the other way round . . . Perhaps not surprisingly, the older law not only treated heads of state as entitled to very special legal consideration, but also frequently made no clear distinction between the head of state on the one hand and the state itself on the other. With international relations having that more personal quality than is usual today, issues of sovereign immunity were mainly concerned with protecting the position of the head of state, just as diplomatic immunities were a matter of protecting his envoy.'[3]

2.3 In the nineteenth century the privileges and immunities variously accorded to the personal sovereign, and the diplomat and the diplomatic mission[4] were extended to warships; with the establishment of the nation state and increasing cross border communication, these privileges and immunities became the basis for the formulation of rules of state immunity based on international custom whereby claims brought against a State in the national courts of another State were barred, unless consented to by the defendant State, and, as regards immunity from measures of execution, no enforcement procedures were to be taken against state property in use for public purposes. This immunity of the State barring proceedings in national courts was adopted with particular rigour as an absolute doctrine by States of common law jurisdiction. In civil law systems there was a greater diversity of court decision and increasing support for a restrictive

[2] A Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments, Foreign Ministers' *RdeC* 247 (994-III) 9. See further H Fox, *Law of State Immunity* (2nd edn, 2008) part II, Chapter 9, 201–236.

[3] Ibid, 35. See also the Harvard Project 'Competence of Courts in regard to Foreign States' (1932) 26 *AJIL* Supplement 455 at 517.

[4] See Chapter **6**.

doctrine, particularly before the Second World War in Italy, Belgium, and the mixed courts of Egypt, and later in Austria and Germany (see the *Empire of Iran* case in 1963 where the German Constitutional Court denied immunity to a claim for repairs carried out to the Iranian embassy in Bonn on the instructions of the Iranian ambassador).[5] This move towards a restrictive doctrine was furthered in 1952 by the United States government, by the issue of a letter of 19 May 1952 from Jack Tate, the Acting Legal Adviser of the State Department to the Acting Attorney-General, which concluded that:

> The Department feels that the increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests from foreign governments for a grant of sovereign immunity.[6]

The UN Convention on the Jurisdictional Immunities of States and their Property 2004

2.4 In 1972 the Council of Europe adopted the 1972 European Convention on State Immunity setting out a list of exceptions (including the State's waiver) to state immunity and this was followed by the enactment in the United States (1976), UK (1978), and in a number of other States of national legislation introducing a range of exceptions to state immunity for commercial transactions and proceedings for personal injuries caused in the territory of the State where the claim was brought.[7] In 2004 the United Nations General Assembly adopted the Convention on the Jurisdictional Immunities of States and their Property. The Convention requires 30 ratifications to bring it into force but, based largely on state practice, as determined by the work of the International Law Commission and 10 years' discussions in the UN General Assembly's Sixth (Legal) Committee, it consolidates the restrictive approach to state immunity. By this approach no immunity is afforded in respect of proceedings brought against a State in national

[5] German Federal Constitutional Court, 13 December 1977, 46 BverfGE 342; 65 ILR 146.

[6] 'Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments', Letter to US Acting Attorney-General, 19 May 1952, (1952) 26 *US Department of State Bulletin* 984 ('the Tate letter').

[7] Foreign Sovereign Immunities Act 1976 (USA); State Immunity Act 1978 (UK); Foreign States Immunities Act 1985 (Australia); State Immunity Act 1982 (Canada); Immunities and Privileges Act 1984 (Malaysia); State Immunity Ordinance 1981 (Pakistan); State Immunity Act 1979 (Singapore); Foreign States Immunities Act 1981 (South Africa); Immunities and Privileges Act 1984 (no 16 of 1984) (Malawi); other small common law jurisdictions have enacted similar legislation, eg St Kitts 1979.

courts in respect of commercial transactions or claims for personal injury or tangible loss caused by act of the State within the territory of the State where proceedings are brought, and, as regards measures of execution, limited enforcement of judgments against the State is permitted in respect of state property in commercial use.[8] Critics of the 2004 Convention maintain that this restrictive approach is still too favourable to States, allowing them to evade commercial liabilities by locating all state funds in the account of the diplomatic mission which is granted immunity under the 2004 Convention (Article 21.1(a)) and by retaining immunity in respect of injury to the person or damage caused in the State's own territory by police or other agents of the State.[9]

The Minister for Foreign Affairs[10]

2.5 The minister for foreign affairs is the regular but far from exclusive intermediary between the State and foreign countries; his functions are regulated by domestic legislation and traditions, and his powers vary according to the political organizations of different States. In international law the minister for foreign affairs is

[8] Under UK law in certain circumstances a judgment against a foreign State given in the court of another country may be recognized and enforced in the UK courts: *NML Capital Ltd v The Republic of Argentina* [2009] 1 Lloyd's Rep 378.

[9] By resolution of 59/38 dated 2nd December 2004 the General Assembly adopted the UN Convention on Jurisdictional Immunities of States and Their Property. As at 1 March 2009 28 States including China, India, Japan, the Russian Federation, Switzerland, and many of the members of the European Community including France, Sweden, and the UK had signed, and six States, Austria, Iran, Lebanon, Norway, Romania, and Portugal, had ratified the Convention.

[10] In most countries the title of the minister who directs foreign relations is Minister for Foreign Affairs, or of Foreign Relations. In the United Kingdom it is Secretary of State for Foreign and Commonwealth Affairs. The United States Constitution (Art 2 Sect 2) confers on the President the responsibility for foreign policy and for negotiations with other States; but he may often look to the Foreign Relations Committee of the Senate and the Foreign Affairs Committee of Congress for advice and support in these matters. He has the power to appoint ambassadors and consuls and to make treaties, subject to the Senate's advice and consent. The Secretary of State is the spokesman of the President and his closest adviser. Although United States foreign policy is thus strictly presidential policy, much depends, in its formation and conduct, upon the personal relationship between the President and the Secretary of State.

In many Commonwealth countries (See Chapter **28**, paragraph **28**.20) a distinction was made for a number of years between the handling of Commonwealth and foreign business. The United Kingdom maintained a separate Commonwealth Office until 1968, when the Foreign and Commonwealth Offices were merged. In India, at the senior level in the Secretariat, directly below the Secretary-General, there were two officials designated 'Foreign Secretary' and 'Commonwealth Secretary' respectively, until at the end of the 1960s the separation became politically and administratively anomalous. From this background grew the use in the Commonwealth of the expression 'Ministry (or Minister) of External Affairs'. The Italian 'Affari Esteri' and the Spanish 'Relaciones Exteriores' could fairly be translated using either term, foreign or external, indifferently. For simplicity, therefore, the short title originally used for this chapter has been retained, except where specific application would make it incorrect.

deemed to have the capacity to represent, to make treaties, and generally to act for the State. Ministers for foreign affairs, together with heads of state and heads of government, are recognized by the Vienna Convention on Treaties 1969, 'in virtue of their functions and without having to produce Full Powers considered as representing their State for the purposes of performing all acts relating to a treaty' (Article 7(2)). In 1919 Denmark was anxious to obtain from Norway an assurance that the latter would do nothing to obstruct Danish plans in respect of the Greenland question and in an application to the Permanent Court of International Justice claiming sovereignty over Greenland relied upon a declaration by the Minister for Foreign Affairs on behalf of the Norwegian government in response to the Danish request given in the following terms: 'I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question'. Although the Court rejected the contention that this declaration was recognition of an existing Danish sovereignty in Greenland, it considered it 'beyond all dispute that a reply of this nature given by a Minister for Foreign Affairs on behalf of his Government in response to a request by a diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs'.[11]

2.6 In England the origins of this high office take us back to the thirteenth century. The King's Secretary is first heard of in 1253, in the reign of Henry III. The office was at first a part of the royal household. Its holder might be a man of character and capacity, fit to be a member of the King's Council, or to be sent as an envoy to foreign Powers. Such were the Secretaries of Henry III and Edward I. Or he might be an inferior officer of the household, and such seems to have been the position of the Secretary of Edward III. In 1433 (reign of Henry VI) two Secretaries were appointed, one by the delivery of the King's Signet, the other by patent. (Letters patent were open letters of authority, usually issued by the Sovereign, written on parchment with the Great Seal pendent at the bottom.) In 1476 (reign of Edward IV) a newly appointed Secretary is described as Principal Secretary. In the reign of Henry VIII the position of Principal Secretaries was advanced. They were still members of the household, but ranked next to the greater household officers, and in Parliament and Council they had their place assigned by statute. In 1539 a warrant issued to Thomas Wriothesley and Ralph Sadler gave them 'the name and office of the King's Majesty's Principal Secretaries during his Highness' pleasure'. After Henry's reign the Secretary ceased to be a member of the household.

[11] *The Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Reports Series A/B. No 53, Judgment 5 April 1933, Second Danish Contention.II.3.

2.7 During the greater part of Elizabeth I's reign there was only one Secretary, but at the close of it Sir Robert Cecil shared the duties with another, he himself being called 'Our Principal Secretary of Estate', and the other 'one of our Secretaries of Estate'. From this time, until the year 1794, it was the rule that there should be two Secretaries of State. The exceptions occurred in 1616, when there were three; from 1707 until 1746, when there was usually a third Secretary for Scottish business; and from 1768 until 1782, when there was a third Secretary for Colonial business.

2.8 Until 1782 the duties of the two Secretaries, as regards foreign affairs, were divided geographically into Northern and Southern Departments, and until that year they were described in official documents relating to the staff common to both as 'His Majesty's Principal Secretaries of State for Foreign Affairs'. But on 27 March 1782 Charles James Fox announced to resident heads of mission that 'le Roi m'ayant fait l'honneur de me nommer son Secrétaire d'État pour le Département des affaires étrangères . . .' Since 1782, therefore, the Secretaryship of State for Foreign Affairs has always been entrusted to a single person. Sir William Anson says: 'I cannot ascertain that any Order in Council or departmental minute authorises or records this important administrative change'.[12]

2.9 It was in the fifteenth and sixteenth centuries that most of the European monarchies established a special branch of the administration for foreign affairs. In the reign of Francis I of France there was a secret committee to which was entrusted the discussion of questions of foreign policy. In France, in the year 1547, at the beginning of the reign of Henry II, the Department of Secretaries of State was founded. There were four such secretaries who shared home and foreign affairs among them. In 1580 a single ministry for foreign affairs was formed, and all foreign correspondence was committed to a single Secretary of State. But previously to 1787 he shared the direction of home affairs with the departments of War, Marine, and the Household. But on Montmorin succeeding to Vergennes as Secretary of State in that year, his functions were confined to foreign affairs.[13]

2.10 The Emperor Charles V had a secret council of state to furnish advice to him through the minister who was charged with the foreign branch of administration, while in Spain a somewhat complicated system was established.

2.11 In contemporary Britain the mode of appointment of Her Majesty's Secretary of State for Foreign and Commonwealth Affairs is by the delivery to him by

12 W R Anson, *Law and Custom of the Constitution* (5th edn), ii, pt 1, 166.
13 F Masson, *Le Département des Affaires Etrangères pendant la Révolution* (Paris, 1877) 56.

the Sovereign of the seals of office. There are three seals, viz. a greater and lesser signet and a small seal called the *cachet;* all of these are engraved with the Royal Arms. The two former now differ only in point of size. In the Foreign and Commonwealth Office, diplomatic and consular commissions signed by the Sovereign pass under the greater signet; the lesser is used in the case of royal exequaturs granted to foreign consular officers, and for royal warrants (such as instruments authorizing the affixing of the Great Seal to Full Powers and to ratifications of treaties); the *cachet*, now very rarely deployed, is used to seal the envelopes of letters containing communications of a personal character made by the Queen to foreign sovereigns.

2.12 Patents were issued from the fifteenth century onwards till 1852. From that time the practice was intermittent till 1868, but since the latter date patents have not been issued, nor in any case would they affect the powers of the Secretary of State for these follow the seals.[14] The British Foreign and Commonwealth Secretary holds a full power from the Queen, authorizing him to negotiate and conclude, subject if necessary to Her Majesty's ratification, any treaty in respect of Great Britain and Northern Ireland (see Chapter **5**, paragraph **5**.15).

2.13 Today governments of other countries address themselves to the minister for foreign affairs either through their own accredited diplomatic agent, or through the diplomatic agent who represents his sovereign or government at their own capital. The former is the normal channel of communication and is generally preferred, since by instructing their own representative a government can be confident that the wording and manner of delivery of their message conforms as exactly as possible to their intentions. Moreover, he will report immediately, if necessary, on the reception it obtained. However, there are occasions when a minister for foreign affairs, wishing to communicate his government's message with the greatest force, will summon a foreign ambassador to receive it personally. In such cases the government's own representative will of course be informed and may be required to take complementary action in the capital where he is accredited. These procedures are flexible, and the choice will depend upon circumstances and upon the personalities involved.

2.14 As a general rule Notes and other formal communications concerning relations with other countries are signed by the minister for foreign affairs or, more frequently, on his behalf. Under his general supervision are drawn up documents connected with foreign relations, drafts of treaties and conventions, statements of fact and law, manifestos, and declarations. The negotiation of treaties rests with him and he watches over their execution. Ratifications of treaties are

[14] Anson, *Law and Custom of the Constitution*, 168.

exchanged by him or his agents. He proposes to the head of state the nomination of diplomatic agents, he is responsible for drawing up their credentials and Full Powers for signature by the head of state, and for the issue of their instructions. He advises the head of state as to the acceptance of persons who have been proposed to be accredited to him, and also as regards the issue of exequaturs to foreign consular officers. Such officers receive their orders from him. Foreign representatives address themselves to him in order to obtain an audience of the head of state.

2.15 At the present day the duties and responsibilities of the minister who is entrusted with the conduct of the foreign relations of his country range over a far wider field. The birth of new States, the advancement of others, constitutional changes which may occur in their methods of government, the growth of organizations designed to foster a better understanding between the nations of the world, the ever-increasing complexity of international relationships, and the many questions to which all these give rise, have largely extended the area within which diplomacy finds its proper scope, and call for close and unremitting attention.

2.16 Occasionally the holder of the office combines this with other functions though it is many years since the United Kingdom Secretary of State for Foreign Affairs has also been prime minister.[15]

2.17 On taking office the minister for foreign affairs informs the diplomatic representatives of foreign States of his appointment, and customarily receives them as soon as possible thereafter at his official residence to exchange greetings with them. He also informs the diplomatic agents of his own country accredited abroad.

2.18 In every country the foreign minister is assisted by a trained staff that, under his guidance, constitute the foreign office or ministry for foreign affairs. In the United Kingdom the permanent staff of the Foreign and Commonwealth Office has at its head the Permanent Under-Secretary of State (in France it is the Secrétaire-Général), who has the rank of ambassador. There may nowadays be around half a dozen officers with the rank of Director-General (so diversified has the work of the Ministry become) and perhaps three times that number of Directors. The exact number and attributions will vary with the ebb and flow of priorities in external affairs. The United Kingdom Secretary of State is also assisted by several junior ministers ('ministers of state' and 'parliamentary under-secretaries'), who hold office as members of the government in power for the time being.

[15] Ramsay Macdonald was his own Foreign Secretary while prime minister from January to November 1924.

Other Ministers of the Central Government of a State

2.19 The conduct of government business with other States is no longer confined to the minister for foreign affairs; as the International Court of Justice has noted, 'with increasing frequency in modern times other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence[16] in the area of foreign relations, and even of certain officials.' Similarly while until relatively recently all communications by diplomats with the government of the State to which they are accredited were addressed to the ministry for foreign affairs, whether in seeking or furnishing information, these days it is often more convenient, when dealing with specialized subjects, such as the detail of financial, commercial, or scientific activities, or questions concerning development, technical cooperation, etc. for a diplomatic officer to establish direct contact with the appropriate department or expert, especially if he has made personal acquaintance with them already. The ministry of foreign affairs should be kept informed in general terms of communications between an embassy and other government departments, also known as 'OGDs'.[17]

Relations with Colleagues

2.20 The practising diplomat at whatever level needs to have some feel for the actual conduct of external policy in the country in which he is serving. Notably it is important to know something of the standing of the foreign minister vis-à-vis his colleagues, particularly the head of government.

2.21 In earlier days this meant the direct relationship with an absolute sovereign. As sovereignty ceased to be absolute, and authority became more diffused, the views of a number of governmental colleagues, notably the colleague in charge of finance, became more important; but since the post of foreign minister always ranks high in seniority, the relationship with the head of government, whether president or prime minister, became the decisive one.

2.22 In times of crisis or of exceptionally heavy decision, the responsibility for external policy has to go back to the head of government (or state in a presidential system

[16] *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)* ICJ Jurisdiction and admissibility of the Claim, 3 February 2006, para 47.

[17] This is required by Article 41 of the Vienna Convention on Diplomatic Relations (see Chapter **9**, paragraph **9**.59).

such as the US or France). But within this generalization history shows many variations. In nineteenth century Europe, beginning with William Pitt the Younger in Britain, there were many heads of government who firmly ran their own foreign policy; other obvious examples were Chancellor Metternich of Austria and Chancellor Bismarck of Prussia, and later of Germany, until his last sovereign, William II, turned against him. As prime minister of Britain, Lord Palmerston came in a somewhat different category; his Foreign Secretary, Lord John Russell (later Earl Russell), conducted foreign affairs with great assiduity, but on major decisions there was little argument.

2.23 It is often said in Britain that modern prime ministers, particularly those in their second or subsequent term of office, arrogate to themselves increasing power over foreign policy. Recent prime ministers like Margaret Thatcher and Tony Blair are egregious examples where their foreign ministers have often been perceived as executors of foreign policy rather than formulators of it. Their personal advisers consequently become major players in the formulation of foreign policy and are frequently approached directly by their opposite numbers in other capitals and by ambassadors of major countries in their own capitals. Such advisers will record their exchanges and pass the record on to the foreign ministry with any instructions which the head of government or state will wish to transmit. Nor are foreign ministers now alone at sub-prime ministerial level in conducting foreign policy. Ministers of international development (aid) frequently play a leading role in foreign policy in developing countries ravaged by internal conflict or natural disaster. Officials from that department on occasion act as the head of mission in such countries or head an autonomous development mission notionally at least subordinate to the ambassador. Other ministers, eg environment ministers over climate change, may play a similarly active role. Within foreign ministries of EU countries it is increasingly the practice to have a junior minister dedicated to European affairs and with an appropriate title, eg Minister for Europe.

2.24 In the European relationships following the First World War some major foreign ministers emerged, notably Aristide Briand in France, Otto Stresemann in Germany, and Sir Austen Chamberlain in Britain. They were foreign ministers of talent and idealism to whom, for too short a time, their heads of government were prepared to give considerable freedom of initiative and action. In the period after the Second World War, many countries achieved independence, and acknowledged leaders handled their own external policies. Jawaharlal Nehru, the first prime minister of independent India, was his own foreign minister until his death in 1964. Dr Kwame Nkrumah of Ghana and Dr Sukarno of Indonesia conducted their own foreign policies until they fell from power. It was noticeable that on the fall of Dr Sukarno, the office of foreign minister gained influence with the appointment of Mr Adam Malik.

2.25 There are also interesting and important cases which defy tidy description. It is often supposed that during the Second World War Winston Churchill ran the British war effort as a whole, with Anthony Eden as a particularly expert 'adviser' on international affairs, whereas under the British parliamentary system, the theory is that the Foreign Secretary is not an 'adviser' but a full Cabinet colleague of the prime minister. The practice, however, diverged substantially from the theory. The United States has had a special method of dealing with world crises, rendered possible by the Congressional system in which the Secretary of State, like other members of the executive, is not a member of the legislature. President Wilson's Secretary of State, Robert Lansing, was by no means inactive; but for purposes of the Versailles Peace Conference of 1919 his Secretary of State de facto was his private adviser, Colonel House. Similarly in the Second World War, Secretary of State Cordell Hull busied himself with specialized matters such as economic policy and Latin America, while Dean Acheson, his Deputy, was involved on a wide front including post-war matters. But for a period, President Roosevelt's Secretary of State for war policy purposes was his private adviser, Harry Hopkins. President Nixon effectively sidelined his Secretary of State, William Rogers, while allowing his National Security Adviser, Henry Kissinger, considerable freedom to conduct foreign policy initiatives vis-à-vis China and Vietnam among other countries. Kissinger himself succeeded Rogers as Secretary of State.

2.26 Lastly it is worth noting the performance, extraordinary for its time or the present day, of A A Gromyko who, having been a deputy foreign minister from 1946 to 1949 and from 1953 to 1957, became in the latter year foreign minister, and held this post until 1985. Given the Russian penchant for secrecy, as notable in current, Communist, or Tsarist times, the full background of this long tenure of office may never be known. But his length of service as minister and in the Politburo and the Supreme Soviet must indicate that his competence, endurance, and loyalty to those in power were such that there was no reason for change.

2.27 In matters which affect them and their country, diplomats thus need to know where the power lies. To put it more specifically, they need to know whether an initially favourable response by a foreign minister to an approach from a diplomatic mission is a foretaste of government policy, or a characteristic piece of personal courtesy, or something in between. In cases where the foreign minister is known to be a weak member of the government, there may be a temptation to seek a favourable decision, either by the use of indirect pressure on him, or even by direct recourse to the head of government. But either of these tactics can cause the apparently weak minister to show a surprising negative strength.

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3

TITLES, PRECEDENCE AMONG SOVEREIGNS AND STATES, AND CEREMONIAL

Titles among Sovereigns	3.1
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Titles among Sovereigns

3.1 Originally the title of 'Majesty' belonged to the Emperor alone, who in speaking of himself said: 'Ma Majesté'. Kings were styled 'Highness', or 'Serenity'. In very early charters the titles *Altitudo*, *Illuster* (for *illustris*), and *Nobilissimus* occur in mentioning the Emperor, and the last of these was given to the King of France until the twelfth century. Sons of emperors were styled *Nobilissimus* or *Purpuratus.*[1] Since the end of the fifteenth century other crowned heads assumed it, the kings of France setting the example.

3.2 The Pope's title of courtesy is Most Holy Father, *Très-Saint Père,* also *Vénérable* or *Très-Vénérable Père*, Holiness, *Sainteté*, or *Béatitude*, and a Catholic sovereign, in addressing him by letter, will sign *dévoué,* or *très-dévoué, fils.* He in turn writes to them as *Carissime in Christo Fili,* or *Dilectissime in Christo Fili,* in Italian *Dilettissimo, Carissimo Figlio.* To emperors *Sire* and *Majesté Impériale* are used. Kings are addressed as *Sire* and *Majesté.* For other sovereign princes entitled to royal honours, *Monseigneur* and *Altesse Royale*, for those who do not enjoy them, *Monseigneur* and *Altesse Sérénissime.* For the heir-presumptive of an imperial or royal crown, *Monseigneur* and *Altesse Impériale*, or *Royale*, as the case may be.

3.3 The same titles of courtesy are given to empresses, queens, and princesses, according to the birth or rank of their husbands, with *Madame* instead of *Sire.*

[1] A R de Maulde-la-Clavière, *Histoire de Louis XII* (Paris, 1893) 289.

When a princess entitled by birth to be called *Altesse Impériale* or *Royale* marries a prince who has not that title she continues to be addressed by it, but with this exception: princesses bear the same titles as their husbands, unless a different rule has been established by convention. The Emperor of Japan is styled *Tennô* in the Japanese language; the title *Mikado* is antiquated, and its use is not desired.

3.4 Emperors and kings who ceased to reign in consequence of their abdication, or for other reasons, continue sometimes to receive the title of 'Majesty' from friendly sovereigns. The Treaty of Paris of 11 April 1814 provided that their Majesties the Emperor Napoleon and the Empress Marie-Louise should preserve these titles and qualities.

3.5 The title of *Altesse* (Highness), which at the outset was given principally to Italian sovereign princes, and in Germany to the electors, as well as to reigning dukes and princes, was borne later by princes on whom the German Emperor[2] had conferred it.

3.6 In former times the King of France was designated 'le Roi Très-chrétien', and the King of Portugal 'le Roi Très-fidèle' since 1748. The King of Spain became 'le Roi Catholique' in 1496; the sovereign of Austria-Hungary was 'His Imperial and Royal Apostolic Majesty' from 1758. These titles were conferred by various popes. Leo X bestowed that of 'Fidei Defensor' (Defender of the Faith) on Henry VIII in 1521, and his successors have continued to bear this title.

3.7 In early times the Russian sovereigns bore the title of Autocrator, Magnus Dominus, Grand-Prince, or Czar (Tsar), the last being the Russian word for 'Emperor'. The surname Monomachus, or Monomakh, was assumed in the twelfth century by Vladimir II, according to some writers because at the siege of Theodosia (Kaffa) he had vanquished in single combat the general of the Genoese,[3] but according to others, by derivation from the title of his maternal grandfather the Greek Emperor Constantine Monomachus.[4] In the seventeenth century the Russian sovereigns began to make use of the word *Imperator* in the Latin translations of official documents addressed to other Powers, and it was Peter the Great who in 1721, after his victories over Charles XII, formally took the title of Emperor of Russia. Notification was made of this fact to all the ambassadors of foreign courts, which did not, however, at once decide to recognize the new title. Queen Anne was the first to do this in 1710, when she

[2] Paragraph **3**.19, n 10.
[3] Raabe and Duncan, *History of Russia,* 62 *n.*
[4] Kluchevsky, *History of Russia,* ii. 22.

instructed Lord Whitworth to present an apology to Peter the Great for the insult committed against his ambassador Mathveof (Matveev) in 1708.[5]

3.8 The Elector of Brandenburg assumed the title of King of Prussia in 1701. It was first recognized by the Holy Roman Emperor, then by most of the other sovereigns of Europe at the conclusion of the Congress of Utrecht. The Pope withheld recognition until 1786.[6]

Precedence among Heads of State and States

3.9 Since the popes and the emperors of the Holy Roman Empire ceased to grant the title of King to other potentates, European Powers adopted the principle that the title taken by the head of a State could not of itself give rise to any sort of precedence over other crowned heads, and that the latter could either recognize the new title, or refuse to do so, or recognize it on conditions.[7]

3.10 The right of the papacy to fix the order of precedence among sovereigns had been recognized for centuries but was not always accepted without demur. The relative place to be taken by them on the occasion of a gathering of more than two often presented difficulties. At the Congress of Vienna in 1814–15 there was an assemblage of crowned heads. Francis I of Austria was the host, and among the guests Alexander I of Russia naturally ranked first. Next to him was the King of Prussia. Among the lesser sovereigns Christian VI doubtless had the first place. Then in order came Maximilian Joseph I of Bavaria and Frederick I of Württemberg, the Elector of Hesse and the Grand Duke of Baden.[8] The question of precedence was finally settled at the Congress (see paragraph **3**.25).

3.11 During the meeting of the three emperors (Austria, Germany, Russia) at Berlin in 1872, these sovereigns took precedence over each other, alternately in each succeeding ceremony, and the national hymns of each country were also played accordingly.

3.12 On the occasion of the Vienna Exhibition of 1873, the sovereigns representing the Great Powers, including the King of Italy and the Sultan, enjoyed precedence over one another in alphabetical order according to the French language. A similar rule was observed as regarded the hereditary princes.

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5 Ch de Martens, *Causes célèbres, etc.,* i. 47. (See Chapter **9**, paragraph **9**.2.)
6 Pradier-Fodéré, i. 51.
7 Ch de Martens, ii. 89.
8 *Cambridge Modern History,* ix. 580 and below.

3.13 It is not usual for heads of state to attend each other's coronations, marriages, and other similar occasions, but crowned heads are often represented by members of their families. The order in which these are placed must be determined by the court officials, or in the last resort by the sovereign who is host.

3.14 Funerals of sovereigns are an exception to the rule mentioned above. The funeral of King George VI, for example, was attended by the Kings of Norway, the Hellenes, Denmark, Sweden, and Iraq; the Queen of the Netherlands and the Grand Duchess of Luxemburg; and the Presidents of France, Turkey, and Yugoslavia. Among the crowned heads precedence was determined by the date of their respective accessions.

3.15 The frequent intermarriages between members of Christian reigning families created bonds of actual relationship among the crowned heads which made it natural and usual for them to communicate to each other news of events, such as accession to the throne, births, marriages, and deaths, etc. This practice, which grew to include brother sovereigns not connected by family ties, has largely fallen into desuetude through the reduction of the number of monarchies in consequence of two world wars. On important occasions communications may also be addressed by the sovereign to presidents of republics, as for example letters of congratulation in reply to formal announcements of their election and assumption of office. Such notifications are in the form of letters from the sovereign and are transmitted through his diplomatic agents, with instructions to present them through the appropriate channel, and this is done by forwarding them to the minister for foreign affairs, with the request that they may be communicated to their high destination. Sometimes a special mission is sent, particularly on such occasions as accession to the throne, or a coronation, or the celebration of a national event of exceptional importance. If the distance is great, the local diplomatic agent may be accredited as special ambassador or envoy for the occasion.

3.16 Questions of precedence have sometimes arisen as between the diplomatic agents permanently accredited and those accredited for the purpose of such ceremonial missions. According to Article 3 of the Regulation adopted at the Congress of Vienna those engaged on an extraordinary mission have not on this ground any claim to precedence. But in practice some variation exists.Genet recalls that on the accession of Pedro V of Portugal the special envoys of the United Kingdom, Austria, Belgium, and Saxony took precedence over the ministers accredited to Lisbon, and ceded it only to the nuncio; while at the coronation of the Emperor Alexander II of Russia the permanent diplomatic agents maintained precedence over those specially accredited for the occasion and having equivalent rank. At the coronation of King George VI, special representatives attending the ceremony enjoyed precedence.

3.17 Friendly sovereigns sometimes exchange high orders of chivalry, which are occasionally also conferred on members of reigning families. On the outbreak of war, in August 1914, the Emperor of Austria, the German Emperor, the King of Württemberg, the Duke of Saxe-Coburg, the Duke of Cumberland, the Grand Duke of Hesse, Prince Henry of Prussia, the German Crown Prince, and the Grand Duke of Mecklenburg-Strelitz having become enemies, ceased to be members of the Most Noble Order of the Garter, and their banners were removed from St George's Chapel at Windsor. When one sovereign confers a decoration on another, the intention to confer is expressed by letter. Occasionally the Garter has been conferred on a foreign sovereign on the occasion of his visiting England; sometimes it has been conveyed to him by a complimentary special mission.[9]

3.18 An official notification made by the Vatican in December 1931 to diplomatic representatives accredited to the Holy See says that cardinals are regarded as equal in rank to princes of the blood, and, in accordance with canon law, claim precedence over everyone except sovereigns and crown princes (*principi ereditari*).

3.19 The Pope in early times claimed the right of fixing the order of precedence[10] among the heads of state. The precedence of the Pope above all other potentates was assumed as a matter of course. Next in order came the Emperor;[11] then the King of the Romans, who was the heir-apparent of the latter (by election).

3.20 The first place being conceded to the Pope, and the second, with universal assent, to the Emperor, up to the fall of the Holy Roman Empire in 1806, the question was as to the others. Gustavus Adolphus of Sweden asserted the equality of all crowned heads, Queen Christina maintained it at the Congress of Westphalia, and in 1718 it was claimed for Great Britain on the occasion of the Quadruple Alliance. But until the matter was finally settled at the Congress of Vienna in 1815 constant disputes arose.

3.21 In 1564 Pius IV declared that France was entitled to precedence over Spain in a question respecting the relative rank of the ambassadors of the two Powers

9 See Redesdale, *Garter Mission to Japan* (London, 1906).

10 The importance of precedence lay in the fact that it conferred a prior entitlement to access to the receiving sovereign. It was not simply a question of vanity and prestige.

11 'Emperor of Germany', though often found in historical works applied to the head of the Holy Roman Empire, and even 'German Emperor', were probably only convenient corruptions of the proper title (Bryce, *Holy Roman Empire,* lib. edit., 1889, 305). From the eleventh to the sixteenth century, that was, until his coronation, *Romanorum rex semper Augustus,* and after the ceremony, *Romanorum Imperator semper Augustus.* In 1508 Maximilian obtained a Bull from Julius II permitting him to call himself *Imperator electus.* This became till 1806 the strict legal designation, though the word 'elect' was often omitted (ibid, 432).

at Rome.[12] In 1633,[13] Christian IV of Denmark having proposed to celebrate the wedding of his son, the Crown Prince, a dispute arose between the French and Spanish ambassadors, the Comte d'Avaux and the Marqués de la Fuente. The Danish ministers proposed to d'Avaux various solutions of the difficulty, and among these that he should sit next to the King, or next to the Imperial ambassador. To this he replied: 'I will give the Spanish ambassador the choice of the place which he regards as the most honourable, and when he shall have taken it, I will turn him out and take it myself'. To avoid further dispute, de la Fuente, on a plea of urgent business elsewhere, absented himself from the ceremony. In 1657, a contest of the same kind occurred at The Hague, between de Thou, Special Ambassador, and the Spanish ambassador Gamarra.[14]

3.22 A more serious affair took place in London on 30 September 1661, on the occasion of the state entry of the Swedish ambassador. It was the custom at such 'functions' for the resident ambassadors to send their coaches to swell the cortège. The Spanish ambassador, de Watteville, sent his coach down to the Tower wharf, whence the procession was to set out, with his chaplain and gentlemen, and a train of about 40 armed servants. The coach of the French ambassador, Comte d'Estrades, with a royal coach for the accommodation of the Swedish ambassador, were also on the spot. In the French coach were the son of d'Estrades with some of his gentlemen, escorted by 150 men, of whom 40 carried firearms. After the Swedish ambassador had landed and taken his place in the royal coach, the French coach tried to go next, and on the Spaniards offering resistance, the Frenchmen fell upon them with drawn swords and poured in shot upon them. The Spaniards defended themselves, hamstrung two of the Frenchmen's horses, mortally wounded a postilion and dragged the coachman from his box, after which they triumphantly took the place which no one was any longer able to dispute with them.[15] Louis XIV, on learning of this incident, ordered the Spanish ambassador to quit the kingdom, and sent instructions to his own representative at Madrid to demand redress, consisting of the punishment of de Watteville and an undertaking that Spanish ambassadors should in future yield the *pas* to those of France at all foreign courts. In case of a refusal a declaration of war was to be notified. The King of Spain, anxious to avoid a rupture, recalled de Watteville from London, and despatched the Marqués de la Fuente to Paris, as ambassador extraordinary, to disavow the conduct of de Watteville and to announce that he had prohibited all his ambassadors from engaging in rivalry in the matter of

12 Flassan, ii. 66; Prescott, *Philip II* (1855 edn) 233, says it was Pius V.

13 Flassan, iii. 13.

14 Lefevre-Pontalis, *Jean de Witt,* i. 245; Chappuzeau, *L'Europe Vivante,* cited by D J Hill, *History of European Diplomacy,* iii. 26.

15 *Diary of John Evelyn* (Wheatley's edn), ii. 486; *Pepys' Diary* (under date of 30 September 1661).

precedence with those of the Most Christian King.[16] The question was finally disposed of by the 'Pacte de Famille' of 15 August 1761, in which it was agreed that at Naples and Parma, where the sovereigns belonged to the Bourbon family, the French ambassador was always to have precedence, but at other courts the relative rank was to be determined by the date of arrival. If both arrived on the same day, then the French ambassador was to have precedence.[17]

3.23 Similar rivalry manifested itself between the Russian and French ambassadors. The latter had instructions to maintain their rank in the diplomatic circle by all possible means and to yield the *pas* to the papal and imperial ministers alone. On the other hand, Russia had not ordered hers to claim precedence over the French ambassador, but simply not to concede it to him. At a court ball in London, in the winter of 1768, the Russian ambassador, arriving first, took his place immediately next to the ambassador of the Emperor, who was on the first of two benches arranged in the diplomatic box. The French ambassador came in late, and climbing on to the second bench managed to slip down between his two colleagues. A lively interchange of words followed, and in the duel which arose out of the incident the Russian was wounded.[18]

3.24 Pombal, Prime Minister of Portugal, in 1760, on the occasion of the marriage of the Princess of Brazil, caused a circular to be addressed to the foreign representatives, announcing the ceremony and acquainting them that ambassadors at the court of Lisbon, with the exception of the Papal nuncio and the Imperial ambassador, would thenceforth rank, when paying visits or having audiences granted to them, according to the date of their credentials. Choiseul, the French Minister for Foreign Affairs, when the matter was referred to him, maintained that 'the King would not give up the recognised rank due to his crown, and his Majesty did not think that the date of credentials could in any case or under any pretext weaken the rights attaching to the dignity of France'. He added that though kings were doubtless masters in their own dominions, their power did not extend to assigning relative rank to other crowned heads without the sanction of the latter. 'In fact,' said he, 'no sovereign in a matter of this kind recognises powers of legislation in the person of other sovereigns. All Powers are bound to each other to do nothing contrary to usages which they have no power to change . . . Pre-eminence is derived from the relative antiquity of monarchies, and it is not permitted to princes to touch a right so precious . . . The King will never, on any pretext, consent to an innovation which violates the dignity of his throne.' Nor did Spain accord a more favourable reception to this new rule of etiquette,

[16] Dumont, *Corps universel diplomatique,* vi. pt. ii. 403.
[17] Flassan, vi. 314.
[18] Ibid, vii. 376.

while the court of Vienna, though the imperial rights had been respected, replied to Paris that such an absurdity only deserved contempt, and suggested consulting with the court of Spain in order to destroy the ridiculous pretension of the Portuguese minister.[19]

3.25 Pombal's proposal consequently did not succeed,[20] and matters remained in this state until the beginning of the nineteenth century. At the Congress of Vienna the Plenipotentiaries appointed a committee which after two months' deliberation presented a scheme dividing the Powers into three classes, according to which the position of their diplomatic agents would be regulated. But as it did not find unanimous approval, especially with the rank assigned to the greater republics, they fell back upon the simple plan of disregarding precedence among sovereigns altogether, and of making the relative position of diplomatic representatives depend, in each class, on seniority, ie on the date of the official notification of their arrival. And in order to do away with the last relic of the old opinions that some crowned heads ranked higher than others, they also decided that: '[d]ans les actes ou traités entre plusieurs puissances qui admettent l'alternat, le sort décidera, entre les ministres, de l'ordre qui devra être suivi dans les signatures'.[21]

3.26 The *alternat* consisted in this, that in the copy of the document or treaty which was destined to each separate Power, the names of the head of that State and his Plenipotentiaries were given precedence over the others, and his Plenipotentiaries' signatures also were attached before those of the other signatories. Thus each Power occupied the place of honour in turn.

3.27 The Holy Roman Empire came to an end in July 1806, in consequence of the establishment of the Confederation of the Rhine, and the precedence over other sovereigns formerly enjoyed by the German Emperor disappeared and could not be claimed by the Emperor of Austria, whose title in 1815 was only 11 years old. Nor was France at that time in a position to reassert her claims to rank before the rest of the Powers. From this date the equality in point of rank of all independent sovereign States, whether empires, kingdoms, or republics, has been universally admitted, and it is improbable that any instances of the refusal of the *alternat* in connection with treaties are now likely to occur, though in the case of multilateral treaties the more convenient method of signing a single instrument

19 Flassan, vi. 193.

20 It took a convulsion of the magnitude of the Napoleonic Wars to sweep away the conflicting pretensions of the numerous kingdoms and principalities which persisted in Europe until the final disintegration of the Holy Roman Empire.

21 But though the *règlement* states that the order of signature shall be decided by lot, the signatures appended to that document followed the alphabetical order of the French language, and the same procedure was adopted for the signature of the *acte final* of the Congress of Vienna.

in the alphabetical order of the participating countries has in modern times supplanted former methods of signing several originals according precedence to each in turn.

3.28 In the Treaty of Versailles and other peace treaties resulting from the Peace Conference of Paris, 1919, the five principal Allied and Associated Powers took precedence of all other States ranged against the Central Powers.

3.29 Dr J B Scott[22] narrates that at the First Peace Conference at The Hague in 1899 the United States' representatives took their place at the table under the letter É (États-Unis), but at the Second Peace Conference of 1907 under the letter A (Amérique), it having in the meantime been remembered that United States of America was the official title; and he observes that this happy philological discovery enabled the United States delegates at the latter Conference to claim the benefit of the first letter of the alphabet, and to take precedence over other American states.

3.30 Nowadays no formal precedence is recognized among nations. The relative seniority of ambassadors, and consequently their precedence in the country where they are appointed, is determined by the date on which they presented their credentials,[23] though in some Roman Catholic and other countries the representative of the Holy See takes precedence regardless of his date of presenting credentials (see Chapter **14**, paragraph **14**.2). In the case of special representatives sent to attend, for instance, coronations or state funerals, precedence is generally the same as that applying to the resident representatives of their countries. But where there is doubt, the rules of protocol of the host government, or court, are decisive.[24] In any strictly Commonwealth context the precedence of members follows the order of the dates on which they respectively obtained independence. The modern law on precedence derives from the Vienna Convention on Diplomatic Relations (see Appendix iii) and in particular Articles 13 and 16.1.

Precedence at the United Nations

3.31 In the United Nations there are two orders of precedence, the precedence between delegates and officials and the precedence between member countries. As regards the first, the President of the General Assembly is held to be the most

[22] J Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907* (New York, 1915).
[23] J Brown Scott, *Le Français, langue diplomatique moderne* (Paris, 1924); cited by Genet, *Traité de Diplomatie, etc.,* i. 325 *n.*
[24] See Chapter **13**, paragraph **13**.10.

senior, followed by the Secretary-General and the Chairman of the Security Council in that order. There follow the Chairman of the Economic and Social Council, the Vice-Presidents of the General Assembly and the Chairmen and Vice-Chairmen of the Assembly Committees. The Secretariat maintains a protocol department to assist delegates, officials, and others with seating arrangements at formal occasions. This department is responsible for determining the general order of precedence for occasions when delegates, officials, and other high dignitaries attend together.

3.32 As regards precedence between delegations, this derives from the arrangements agreed for the order of seating and roll-call voting in the General Assembly. Each year, a country is chosen by lot to take the first seat to the left in the front row of the Assembly and the remainder follow in English alphabetical order from left to right in each row of seats. This order of precedence is used in respect of all delegates and advisers of equivalent rank who do not hold any office (eg Chairman or Vice-Chairman). The only variation is at Security Council lunches, where representatives are seated in the order of seating which they have in the Security Council itself. The principle of precedence based on the date of presentation of credentials does not apply at the United Nations.[25]

[25] See also Chapter **23**.

4

THE LANGUAGE, FORMS, AND MEANS OF DIPLOMATIC INTERCOURSE

Language: History	4.1	Non-Paper and Démarche	4.17
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Language: History

Latin, being the written language not only of the Roman Empire, but also of its successor the Holy Roman Empire and of the Roman Catholic Church, was not surprisingly the written language of most early European diplomacy. It had the advantage of being a neutral language but the drawback of being little understood in that period beyond the ranks of the clergy.[1] From the Renaissance onward, instructions to diplomatic representatives began to be framed in the language of the envoy's own country, though the use of Latin was common until the eighteenth century.[2] Latin was also used in conversation between diplomats, where the parties were unable to speak each other's language. French came next in frequency of use after Latin. At the end of the fifteenth century it had become the court language of Savoy and the Low Countries, and also of the Emperor's court. When the League of Cambrai was formed, in 1508, the Full Powers of both Imperial and French negotiators were drawn up in French, **4.1**

[1] P Chaplais, *English Diplomatic Practice in the Middle Ages* (London, 2003) 127–33 and K Plöger, *England and the Avignon Popes: the practice of diplomacy in late medieval Europe* (London: Legenda, 2005) 189–92.

[2] See Chapter 5, paragraph 5.12.

but the ratifications were in Latin. Henry VI of England wrote to Charles VII of France in French, and that language was usually employed both in writing and speaking between the two countries. At the end of the sixteenth century the King of France no longer wrote Latin except to the King of Poland, to such an extent had the use of French gained ground.[3]

4.2 At the beginning of the sixteenth century the majority of agreements drawn up in English, German, or Italian had a regional or quasi-regional character. English served for Anglo-Scottish relations, German for those of German princes and of Germany with Bohemia, Hungary, and Switzerland. Italian was sometimes employed between the smaller Italian states and more widely in the eastern Mediterranean as a result of the Venetian Republic. Italian was occasionally used by English ambassadors at the Porte (Constantinople) in the early seventeenth century in communicating with London. In the Low Countries, Lorraine, and at Metz, French was naturally the native language. Only two languages, however, were admitted for drawing up international compacts: Latin for the apostolic notaries and the whole school attached to the Roman Chancery, and French. England and Germany constantly used the latter, above all for treaties with France and the Low Countries. At the end of the fifteenth century England reverted to Latin for its treaties with France.[4]

4.3 The treaties of Westphalia (1648) were in Latin but continental countries increasingly used French from the early eighteenth century onwards. At Aix-la-Chapelle, in 1748, a separate article was annexed to the treaty of peace signed by Great Britain, Holland, and France, to the effect that the use of the French language in the treaty of peace was not to be taken as prejudicing the right of the Contracting Parties to have copies signed in other languages. A similar article was attached to the Treaty of Paris of 1763, between Great Britain, France, and Spain; to the Treaty of Versailles of 1783, between Great Britain and France;[5] and to the Final Act of the Congress of Vienna.[6]

4.4 In 1800 Lord Grenville introduced the practice of conducting his relations with foreign diplomats accredited to the Court of St James's in English instead of French, the language previously employed. Lord Castlereagh, when at the

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[3] de Maulde-la-Clavière, i. 80, 389.

[4] Ibid, 209.

[5] Jenkinson, iii. 342.

[6] 'La langue française ayant été exclusivement employée dans toutes les copies du présent traité, il est reconnu par les Puissances qui ont concouru à cet acte que l'emploi de cette langue ne tirera point à conséquence pour l'avenir; de sorte que chaque Puissance se réserve d'adopter, dans les négociations et conventions futures, la langue dont elle s'est servie jusqu'ici dans ses relations diplomatiques, sans que le traité actuel puisse être cité comme exemple contraire aux usages établis.' d'Angeberg, *Le Congrès de Vienne* (Paris, 1864).

headquarters of the Allied Powers in 1814–15, wrote in English to the foreign sovereigns and ministers. Canning, in 1823, discovered that the British representative at Lisbon was in the habit of writing in French to the minister for foreign affairs, although the latter addressed him in Portuguese; he therefore instructed him to use English in future, a practice ratified by Lord Palmerston in 1851.

Language: Modern Practice

4.5 Since the mid-nineteenth century, the right of a British diplomat to use his own language for communications to the government to which he is accredited does not seem to have been contested, the right claimed by Great Britain being recognized by her as belonging to every other State. While this right of the representative of every nation to use the official language of that nation is now generally accepted, there is no universal rule making obligatory the use of one language rather than another, and practice varies. At many posts it is customary to accompany a Note which has been by deliberate preference written in the language of the sender, with a translation into the language of the receiving country, typed on plain paper and bearing the heading 'Courtesy Translation', ie that it is strictly without official status. This practice is not merely a courtesy; it may sometimes be advisable in order to avoid on the one hand delay, or on the other the possibility of misinterpretation. Occasionally, when the languages of the sending or receiving State (or both) are not widely known, there may be mutual agreement to use English or more rarely French as a convenient medium of communication.

4.6 As regards treaties, conventions, etc, these, when concluded between two countries, are now ordinarily signed in two texts, ie in the respective languages of the two countries, though important exceptions occur. The Egypt-Israel Peace Treaty of 1979 was written in Arabic, Hebrew, and English and provided that the English text would be the authoritative one in cases of differences of interpretation.[7] In the case of treaties of a general nature—multilateral treaties—concluded between many states, the usual practice was formerly to use French, but after a discussion between the French Foreign Minister, M. Pichon, President Wilson, and Mr Lloyd George in January 1919, French and English were generally accepted as having parity; and they were adopted as the official languages of the Versailles Conference and later of the League of Nations. Treaties concluded under the auspices of the United Nations normally have Chinese,

[7] G R Berridge, *Diplomacy Theory and Practice* (3rd edn, Palgrave, 2005) 80.

English, French, Russian, Spanish, and Arabic texts, all equally authoritative.[8] In the European Union English has now emerged in the last 20 years and in particular since the expanding external dimension of the EU and the accession of Sweden, Austria, and Finland in 1995, as the language most used by officials, though the use of French is very much current. In general, as English has usurped the position of French as the international language (largely as a result of the US's predominant position in international communications through the introduction of the Internet etc) so this has carried through into diplomacy.

Forms and Means: Official Communications

4.7 The most generally used form of written communication between a head of mission and the Minister of Foreign Affairs is called a *Note.* There are a number of possible variations of detail in the drafting and presentation of Notes, to which no universally accepted rules apply. The diplomatic services of different countries have their own standing instructions on matters of drafting and procedure; there is some latitude in the use of terms designating types of document; and local custom will be found to vary. The indications given in this chapter can therefore be only of the most general nature. In practice, every head of mission, having taken account of local usuage, will ensure that his correspondence is drafted in the manner which he judges most fitting in any given circumstances. Certain formulae are current, but the exact choice of words must always be a matter of discretion.

4.8 Essentially a Note is a formal personal letter but the most common form of exchange between an embassy and the foreign ministry is a third person Note called a *Note Verbale.*[9] The idea originally implicit in this term was that it embodied the substance of an oral communication, or of a conversation, of the wording

[8] For a more detailed account of the use of languages in the United Nations, see Chapter **23**, paragraphs **23**.68–**23**.73.

[9] The traditional French terms now of historic interest only used to indicate its component parts were:

1. *L'appel* (Sir, Your Excellency, the Ministry, Monsieur le Ministre etc), which may be placed *en vedette,* above the body of the letter; *en ligne,* at the beginning of the first line; or *dans la ligne,* after a few words in the first sentence. The first is the most usual.
2. *Le traitement,* or the title used when mentioning the person addressed in the body of the letter. (Your Excellency, the Ministry, etc).
3. *La courtoisie,* or the complimentary phrase which concludes the letter (assuring respect, consideration, gratitude, etc).
4. *La souscription,* the signature. When preceded by 'votre obéissant serviteur', it was said to be written *en dépêche;* if by 'veuillez agréer etc.', it was said to be *en billet,* the former being the more ceremonious.
5. *La date,* which includes the place as well as the time of writing.
6. *La réclame,* which consists of the name and official designation of the person addressed, and is reproduced in the address (*la suscription*) on the envelope.

of which it constituted a formal record, although not designed for publication. The title *Note Verbale* is sometimes written at the top of the paper. It is the customary vehicle for written communications between an embassy and a ministry of foreign affairs and is typed on headed notepaper, beginning with the formula: 'The . . . Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to inform them that . . .' (or, 'to invite their attention to the following matter'). The usual ending is: 'The Embassy avails itself of this opportunity of assuring the Ministry of its highest consideration'. Below this should appear the date, the embassy's stamp, and the drafter's initials. Below this again, the *réclame* (see n 9), ie the ministry of foreign affairs or other diplomatic missions.

4.9 Current British diplomatic practice on the writing of Notes is as follows:

- *Notes Verbales* have standard opening and closing paragraphs.
- The paragraphs are not numbered.
- Notes are justified and double line spaced.
- They are written using a plain font.
- They are printed on blue paper with an embossed crest and sent in a matching envelope.
- They are always sent to the Protocol Department of the MFA.
- Each Note has an individual number followed by the year of issue.
- They should be stamped using the embassy/high commission stamp at the bottom, between the text and the date and the stamp initialled by the issuing officer.
- They should be accompanied by one photocopy on plain paper, and if more than one page the copy (not the original) should be stapled.
- All notes should be registered, either electronically or on paper.

Notes Verbales can be used for routine matters, informing the Ministry of a Head of Mission's absence, overflight requests, requests for protocol assistance during a VIP visit, or for serious diplomatic business, eg a protest note at the policy of the receiving government, a statement of the sending government's position, or policies on a matter of mutual concern. Such Notes can also be used in conveying information to other diplomatic missions on the arrival of ambassadors, opening of books of condolence etc.

At the extreme end of the scale is a Note containing an ultimatum threatening war. Such a Note was delivered by the British ambassador in Berlin on 3 September 1939. The text is below.

> Sir,
>
> In the communication which I had the honour to make to you on September 1 I informed you, on the instructions of His Majesty's Principal Secretary of State for

Foreign Affairs, that unless the German Government were prepared to give His Majesty's Government in the United Kingdom satisfactory assurances that the German Government had suspended all aggressive action against Poland and were prepared promptly to withdraw their forces from Polish territory, His Majesty's Government in the United Kingdom would, without hesitation, fulfil their obligations to Poland.

2. Although this communication was made more than 24 hours ago, no reply has been received but German attacks upon Poland have been continued and intensified. I have accordingly the honour to inform you that unless not later than 11 a.m., British Summer Time, today September 3, satisfactory assurances to the above effect have been given by the German Government and have reached His Majesty's Government in London, a state of war will exist between the two countries as from that hour.

Courtesy ending[10]

Collective Note

4.10 This is a Note addressed by the Dean of the Diplomatic Corps on behalf of all missions accredited to a government or by representatives of several States to a government in regard to some matter in which they have been instructed to make a joint representation. The latter involves close relations between the Powers whose representatives sign it.

An extension of this procedure, stemming from the development of multilateral diplomacy, is for ministers meeting in some multilateral regional or other grouping, (eg African Union, EU, various Contact Groups, etc) to issue a public communiqué or statement at the conclusion of their meeting which they would ask to be delivered by some/all of their diplomatic representatives in one or more of the capitals involved in the subject of their communique. The representative(s) would be asked to reinforce and perhaps enlarge on the public message in the communique and convey any response or reaction. When the EU takes such action it usually involves the delivery by the troïka[11] of countries of a formal EU Note approved by the EU Council under CFSP procedures, ie by unanimity and can often take the form of a joint démarche (see below at paragraph **4**.19 and Chapter **27**, paragraph **27**.18).

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10 Documents on British Foreign Policy 1919–1939 Third Series, Vol VII, No 757.

11 The 'Troïka' represents the European Union in external relations that fall within the scope of the common foreign and security policy (CFSP). Since the Treaty of Amsterdam, the Troïka has brought together:

- the foreign affairs minister of the Member State holding the presidency of the Council of the European Union;
- the secretary-general/high representative for the common foreign and security policy;
- the European Commissioner in charge of external relations and European neighbourhood policy.

Identic Notes

These are not always exactly similar. It is, however, desirable that they should **4.11**
be worded as closely as possible and be identical in substance. They should be presented, as far as possible, simultaneously. On 4 February 1897, a Greek force landed in Crete and proclaimed the occupation of the island in the name of the King of the Hellenes. The Powers intervened, and in concert drew up the terms of an Identic Note to be presented to the Greek government by the representatives of the United Kingdom, Austria-Hungary, France, Germany, Italy, and Russia. This was in the following terms:[12]

> Athènes,
>
> le 2 mars, 1897.
>
> M. le Ministre,
>
> J'ai reçu de mon Gouvernement l'ordre de porter à la connaissance de votre Excellence que les Grandes Puissances se sont entendues pour arrêter une ligne de conduite commune destinée à mettre fin à une situation qu'il n'a pas dépendu d'elles de prévenir, mais dont la prolongation serait de nature à compromettre gravement la paix de l'Europe.
>
> A cet effet les gouvernements d'Allemagne, d'Autriche-Hongrie, de France, de la Grande-Bretagne, d'Italie et de Russie sont tombés d'accord sur les deux points suivants:
>
> 1. La Crète ne pourra en aucun cas, dans les conjonctions actuelles, être annexée à la Grèce;
> 2. Vu les retards apportés par la Turquie dans l'application des réformes arrêtées de concert avec elles et qui n'en permettent plus l'adaptation à un état de choses transformé, les Puissances sont résolues, tout en maintenant l'intégrité de l'Empire Ottoman, à doter la Crète d'un régime autonome absolument effectif et destiné à lui assurer un gouvernement séparé sous la haute suzeraineté du Sultan.
>
> La réalisation de ces vues ne saurait, dans la conviction des Cabinets, s'obtenir que par le retrait des navires et des troupes helléniques qui sont actuellement dans les eaux ou sur le territoire de l'île occupée par les Puissances. Aussi attendons-nous avec confiance cette détermination de la sagesse du Gouvernement de Sa Majesté, qui ne voudra pas persister dans une voie contraire à la résolution des Puissances, décidées à poursuivre un prompt apaisement aussi indispensable à la Crète qu'au maintien de la paix générale.
>
> Je ne dissimulerai pas toutefois à votre Excellence que mes instructions me prescrivent de vous prévenir qu'en cas de refus du Gouvernement Royal les Grandes Puissances sont irrévocablement déterminées à ne reculer devant aucun moyen de contrainte si, à l'expiration d'un délai de six jours, le rappel des navires et des troupes helléniques de Crète n'était pas effectué.

[12] *BFSP,* xci, 175.

4.12 Treaties are nowadays frequently concluded in the form of an *Exchange of Notes.* This subject is fully dealt with in Book IX *International Transactions*.

4.13 In British usage, *Despatch* was the name given to a formal letter from the Secretary of State for Foreign and Commonwealth Affairs to a head of mission abroad, or vice versa; or from one head of mission to another. Despatches are now rarely sent and, where they are, they are sent electronically and are almost invariably from a head of mission to his government not vice versa. First impressions and valedictory despatches in the British diplomatic service are now no longer normally circulated to other diplomatic posts. The present editor's valedictory from Rome in 2006 was the last to be circulated to all diplomatic posts.

4.14 In addition to special forms of address and styles of correspondence, diplomatic intercourse has evolved its own characteristic idiom, in which certain set phrases are used to convey, with the restraint of a studied politeness, statements or warnings which, if delivered more bluntly, would raise tempers. These expressions have become the current coin of the profession and their meaning is generally accepted. They are merely the counterpart of the parliamentary language enjoined upon legislators and other debaters, and they are preferable to the 'diplomacy by insult' practised by early Byzantine rulers and by like-minded empire-builders of the twentieth century. In matters of language the art of the diplomat, as observed by André Maurois,[13] is that of expressing hostility with courtesy, indifference with interest, and friendship with prudence. When an ambassador, speaking on behalf of his government, says that they 'cannot remain indifferent' to a particular situation or course of action, he is understood to mean that, should that situation arise, they will intervene. If they are said to 'view with concern', or 'with grave concern,' a matter under discussion, this means they are proposing to take a strong line about it. 'My Government will reconsider its position' is a warning that a present state of friendliness may not continue. 'Is obliged to tender grave reservations' means in effect 'will not allow;' while 'will be obliged to consider its own interests' indicates that, however its obligations have hitherto been interpreted, it will claim a free hand, which could result in a severance of relations. 'My Government will regard this as an unfriendly act' means 'will regard this as a threat of armed hostilities'. He may add 'and will decline to be responsible for the consequences', with the corresponding intention.[14]

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[13] *L'éloge du diplomate.*

[14] Lord Trevelyan amusingly caricatured the abuse of diplomatic language in the communiqués issued after conferences to which the press have had no access. ' "A frank exchange of views" = "nearly came to blows." "In the spirit of brotherly solidarity" indicates that one side made clear to the other that it was becoming too independent for its future comfort. "An atmosphere of cordiality" may mean that, although one party was on the wrong side of the ideological fence, it was hoped that a little flattery might induce it to do something in the other's interests.' H Trevelyan, *Diplomatic Channels* (London, 1973) 91.

Bout de papier or Speaking Notes

4.15 The preceding paragraphs have been concerned with the official forms of written communication. An unofficial and personal adjunct to oral communication frequently used is known as a *bout de papier* or more frequently now as speaking notes. When an ambassador or a member of his staff makes an appointment to discuss some matter with a foreign representative, or in the ministry of foreign affairs, he sometimes has a few lines of written notes to assist his memory. He may decide to leave this piece of paper (which is much more informal than a Note) with the person to whom he has been speaking, in order to ensure that there will be no room for doubt regarding the main points which he has sought to make. The recipient generally finds this helpful and is grateful for it, especially if the conversation has been in a language in which one or other participant is only moderately proficient. The piece of paper is prepared in such a way that it bears no attribution. While it is thus both a personal courtesy and a practical convenience, it cannot be claimed by either side as possessing any official status.

4.16 In different circumstances a *bout de papier* discreetly passed across the table has saved the situation in many a conference about to founder on the apparent inability of either side to move towards a mutually agreeable formula. One side, let us suppose, has worked out a proposition of which it cannot possibly go on record as the proposer, but which, in the interests of cooperation, it could agree to recommend for its government's consideration, if the other side were to advance it. The anonymous piece of paper therefore contains some such form of words as 'If you felt able to propose . . . I should be prepared to try it on my government'. Such a piece of classic give and take can often produce a surprisingly happy result. But if it only elicits a shake of the head, at least no word has been spoken and no bones broken. In any case the procedure must be nicely judged and depends, like most good diplomacy, on mutual confidence and respect between negotiators. It would be worse than useless if the opposing delegation were of the kind that aimed not at agreement but at scoring points for the sake of publicity.

Non-Paper and Démarche

4.17 A non-paper is even less official than a *bout de papier*. It is defined as an off-the-record or unofficial presentation of (government) policy and is used when a government does not wish formally to avow the position they have adopted or advanced in the paper but wishes to air certain ideas to see how they will be received. It can also be used to good effect in multilateral diplomacy where one government undertakes to draft a non-paper to identify the greatest amount of common ground between the other participants in a negotiation while not

accepting to be bound by or taking any responsibility for the positions set out in the non-paper.

4.18 Of greater currency in the modern world is the use of letters between heads of state and government sent electronically and delivered by hand of the ambassador or a member of his mission to the private office of the president or prime minister. This may or may not involve a brief covering letter from the ambassador which might be along the following lines:

Your Excellency

I have been asked by my President to convey to you the enclosed message. I am of course available to convey any response or to attempt to clarify any points in the message.

Courtesy ending

4.19 A less formal way of making diplomatic representations or protests is called a démarche. The following from the US Department of State handbook sets out the typical procedures and purposes of a démarche.

> A U.S. Government démarche to a foreign government is made on the basis of 'front-channel cable'[15] instructions from the Department of State. Although the content of a given démarche may originate in another U.S. Government agency, only the State Department may also instruct a post to deliver the démarche. Unless specifically authorized by the State Department, posts should not act on instructions transmitted directly from another post, or from another agency, whether by cable or other means (e.g., e-mail, FAX, or phone).
>
> Any State Department officer or other official under the authority of the chief of mission can make a démarche. Unless the Department provides specific instructions as to rank (for example: 'the Ambassador should call on the Foreign Minister'), the post has discretion to determine who should make the presentation and which official(s) in the host government should receive it.
>
> **Preparation of the Démarche**
>
> Démarche instruction cables from the Department should include the following elements:
>
> - (1) OBJECTIVE: The objective is a clear statement of the purpose of the démarche, and of what the U.S. Government hopes to achieve.
> - (2) ARGUMENTS: This section outlines how the Department proposes to make an effective case for its views. It should include a rationale for the U.S. Government's position, supporting arguments, likely counter-arguments, and suggested rebuttals.

[15] Any official State Department cable, sent from a post or the Department, which could contain substance ranging from policy guidance to a specific instruction or a visa revocation.

- (3) BACKGROUND: The background should spell out pitfalls; particular sensitivities of other bureaus, departments, or agencies; and any other special considerations.
- (4) SUGGESTED TALKING POINTS: Suggested talking points should be clear, conversational, and logically organized. Unless there are compelling reasons to require verbatim delivery, the démarche instruction cable should make it clear that post may use its discretion and local knowledge to structure and deliver the message in the most effective way. ('Embassy may draw from the following points in making this presentation to appropriate host government officials.')
- (5) WRITTEN MATERIAL: Use this section to provide instructions on any written material to be left with the host government official(s). Such material could take the form of an aide-mémoire, a letter, or a 'non-paper' that provides a written version of the verbal presentation (i.e., the talking points as delivered). Unless otherwise instructed, post should normally provide an aide-mémoire or non-paper at the conclusion of a démarche. Classified aide-memoire or non-paper must be appropriately marked and caveated as to the countries authorized for receipt, i.e., Rel. UK (Releasable to UK).

Delivery and Follow-up Action

Upon receipt of démarche instructions from the Department, post should make every effort to deliver the démarche to the appropriate foreign government official(s) as soon as possible.

After delivering the démarche, post should report to the Department via front-channel cable. The reporting cable should include the instruction cable as a reference, but it need not repeat the talking points transmitted in that cable. It should provide the name and title of the person(s) to whom the démarche was made, and record that official's response to the presentation. As appropriate, the reporting cable should also describe any specific follow-up action needed by post, Department, or the foreign government.

Other informal means of communication

4.20 The advent of the fax, Internet, email, video or telephone conferencing, and other forms of information technology has transformed the means of diplomacy.[16] A busy officer in an embassy will often prefer to email or even text his key contact(s) in host government departments to ascertain their views as rapidly as possible and without having to visit the ministry concerned. A sensible officer will use this approach when eliciting factual information. Often, however such approaches beg the question from the Ministry, to which there may be no clear answer 'And what is *your* government's position on this point?' Where he needs to persuade the host government of the wisdom of his government's position, he will usually find that this can be best done face to face. Officials in government

[16] For a very full discussion of this important subject see Chapter 6 'Telecommunications' in G R Berridge, *Diplomacy Theory and Practice* (3rd edn, Palgrave, 2005).

departments now regularly communicate by telephone or other electronic means directly with their opposite numbers in other capitals, bypassing the embassy. This is now a fact of life and, given the specialization increasingly required to discuss issues like climate change internationally, it clearly makes sense for the 'experts' to communicate directly and ensure that the foreign ministry is kept informed as required under the Vienna Convention on Diplomatic Relations (see Chapter **9**, paragraph **9**.59). It is not however just a question of courtesy to inform the embassy of the substance of the exchange. The well-informed diplomat will be best-placed to put the information received into a broader political context. An example might be where he needed to remind the official in his home capital that the official with whom they have been communicating is a political appointee whose career is closely linked to his soon-to-be-departing minister.

4.21 At a higher level, heads of state or government often speak directly, with or without a video dimension, by secure telephone to discuss and resolve major issues. In the early days of hot-lines between say Washington and Moscow or Washington and London, this was as a diplomatic weapon of last resort. These days such exchanges are fairly routine. Foreign ministers will often speak to each other by such means several times a day during a crisis. In Western capitals, such conversations will be recorded and a note or record prepared by a private secretary to inform those who need to know of the main points agreed or disagreed. In London, the Prime Minister's office tends to take a very restrictive view of the number of people who need to see a record of the Prime Minister's discussions with his principal international interlocutors, often excluding ambassadors and senior officials in the Foreign and Commonwealth Office, to their irritation and to the detriment of the smooth working of diplomacy. An ambassador who is ignorant of the exchanges between his government and his host government at the highest levels cannot be expected to execute his mission effectively.

4.22 While prime ministers, presidents and foreign and other ministers regularly interact as described above, there is another kind of activity which is essentially the antithesis of diplomacy, viz. megaphone diplomacy. The extract below from an article in the *International Herald Tribune* illustrates how such use of public statements and press releases can be counterproductive and how much more preferable is 'quiet' or traditional diplomacy.

> In a direct reference to Russia, the European Commission president, José Manuel Barroso, last week decried 'the use of energy resources as an instrument of political coercion.' Meanwhile, Vice President Dick Cheney on Thursday accused Russia of using its energy resources as 'tools of intimidation or blackmail.'
>
> These have only been the latest examples of a wide-ranging public dressing-down of Russia, including calls for its exclusion from the Group of 8 industrialized nations.

> Given the reaction that this megaphone diplomacy has caused in Moscow, it should be abandoned. Western policy makers must recognize that Russia's new-found international clout has fostered a national self-confidence unprecedented in the post-Soviet era.
>
> As a result, Moscow is no longer willing to turn the other cheek when provoked. After the Western comments last week, Gazprom's chief executive, Alexei Miller, ominously warned that 'attempts to limit Gazprom's activity in the European market and to politicize gas issues, which are in fact solely economic, will not produce good results.'[17]

4.23 Megaphone diplomacy is often the product of domestic political needs where politicians feel the need for their own domestic political purposes to talk toughly and often roughly even when it will damage their longer term aims. It often falls to the diplomat on the ground to attempt to repair the damage done by resorting to megaphone diplomacy.

'Rejection' of Diplomatic Communications

4.24 Properly understood, this literally means the 'casting back', in other words the return to the sender of the actual document itself. This occurs only rarely and the reason for the 'rejection' is usually either the objectionable language of the document in question, or that it is a gross interference with the internal affairs of the addressee country, or both.

4.25 In 1943 Stalin sent a telegram to Winston Churchill about the Arctic Convoys, of which the form and substance were such that the Prime Minister refused to receive it and, sending for the Soviet ambassador in London, handed it back to him in an envelope. The Ambassador Gousev recognized the document and said that he had been instructed to deliver it. The Prime Minister replied 'I am not prepared to receive it' and indicated 'in a friendly manner' that the interview was at an end.[18]

4.26 More recently, shortly before the outbreak of the first Gulf War, President George H W Bush sent his Secretary of State, James Baker, in January 1991 to Geneva to deliver via the Iraqi Foreign Minister, Tariq Aziz, a letter to the Iraqi President Saddam Hussein. It contained a blunt final warning to pull back from the brink of war by withdrawing from Kuwait and a particular threat to Saddam about the use of weapons of mass destruction, support for terrorist action, and the destruction of Kuwait's oilfields: 'You and your country will pay a terrible price if you

[17] S Charap and J Hecker in an article 'Enough Megaphone Diplomacy' in the IHT, 12 May 2006.

[18] Churchill, *The Second World War* (London: Cassell, 1950) v.

order unconscionable action of this sort'. Aziz read the copy of the letter which was outside the original in a sealed envelope but he was clearly under great strain ('[o]ne member of the American delegation noticed him beginning to perspire and a slight tremble in his hand'). He refused to deliver the letter or take the copy and it was left on the table as the talks broke up after seven hours of meeting.[19]

Correspondence between Sovereigns and Heads of State

4.27 The titles used by sovereigns when addressing each other in correspondence have been described in Chapter **3**, paragraphs **3**.1–**3**.4 above. The ceremonial observed is less strict than in the case of communications addressed to others; between equals the style is more familiar and less formal; for this reason the form designated in French *Lettres de Cabinet* is that used by preference for communications between sovereigns.

Such letters begin, Monsieur Mon Frère (et cher Beau-Frère), Sir My Brother (and dear Brother-in-Law); Madame Ma Sœur (et chère Nièce), Madame My Sister (and dear Niece); Monsieur Mon Cousin (Sir My Cousin); etc. In the body of the letter the sovereign speaks of himself in the singular, and gives to his equals the title of *Majesté*, *Altesse Royale*, etc. Princes of lesser rank speak of crowned heads as *Sire,* both in the body of the letter and its signature.

Some friendly expressions, which vary according to the relations or degree of relationship between the two sovereigns, close the letter, such as 'Je saisis cette occasion pour Vous offrir les assurances de la haute considération et de l'invariable attachement avec lesquelles Je suis, Monsieur Mon Frère, de Votre Majesté le bon Frère, N.'

The signature of the sovereign to such letters is in some countries countersigned by a minister of state. Letters in this form are customarily employed for credentials of ambassadors or ministers accredited between sovereigns, or letters announcing their recall, or expressions of congratulation or condolence conveyed to other sovereigns. (See Chapter **5** below for examples of credentials.)

4.28 Letters addressed by sovereigns to presidents of republics are in the more formal and ceremonious style of *Lettres de Chancellerie* (on large paper) beginning with the name and title of the sovereign, followed by the title of the head of the State to whom the letter is addressed: 'To the President of the Republic of ..... Our Good Friend' (or some equivalent). For instance the presidents of the United States of America and of the French Republic are addressed by the British Queen

[19] Freedman and Karsh, *The Gulf Conflict* (London, 1993) 254–260.

as 'Dear Mr President/Monsieur le Président and the correspondence is signed 'Your Good Friend Elizabeth R'. These are ordinarily credentials of ambassadors or ministers, letters of recall, announcements of the death of the late sovereign or of accession to the throne, congratulations on election etc, and may end by an expression of the value attached by the sovereign to the maintenance of the friendly relations happily subsisting between the two countries. They are usually countersigned by a minister of state.

4.29 Letters addressed by presidents of republics to sovereigns usually begin: 'A.B. President of the Republic of ..... To His Majesty the King of ..... Great and Good Friend' (or some equivalent). These may be credentials of ambassadors or ministers, letters of recall, announcement of election to the presidency, etc. In the case of many republics such announcements of assumption of the office of president are customary.

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5

CREDENTIALS AND FULL POWERS

Letters of Credence or Credentials	5.1
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Letters of Credence or Credentials

5.1 The form of credentials used in the United Kingdom in the case of foreign sovereigns is that of a *Lettre de Cabinet,* in the following terms:

> Sir My Brother and dear Cousin/Madam My Sister and dear Cousin/Your Highness,
>
> Being desirous to maintain without interruption the relations of friendship and good understanding which happily subsist between the two Crowns, I have selected My Trusty and Well-beloved X.Y. to proceed to the Court of Your Majesty in the character of My Ambassador Extraordinary and Plenipotentiary/Envoy Extraordinary and Minister Plenipotentiary.
>
> Having already had ample experience of X.Y.'s talents and zeal for My service, I doubt not that he/she will fulfil the important duties of his/her Mission in such a manner as to merit Your approbation and esteem, and to prove himself/herself worthy of this new mark of My confidence.
>
> I request that You will give entire credence to all that X.Y. shall have occasion to communicate to You in My name, more especially when he/she shall express to Your Majesty/Your Highness My cordial wishes for Your Happiness, and shall assure You of the invariable attachment and highest esteem with which I am,
>
> Manu Regia
>
> Sir My Brother
>
> Your Majesty's/Your Highness's
>
> Good Sister
>
> Elizabeth R.
>
> Buckingham Palace
>
> To My Good Brother/Sister the King/Queen of [Country]
>
> His/Her Highness [Country]

5.2 Or, in the case of a republic, a *Lettre de Chancellerie,* in such terms as these:

> Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith, &c., &c., &c.
>
> To the President of the Republic of Z. Sendeth Greeting!
>
> Our Good Friend! Being desirous to maintain, without interruption, the relations of friendship and good understanding which happily subsist between Our Realm and the Republic of Z., We have made choice of Our Trusty and Well-beloved X.Y. to reside with You in the character of
>
> Our Ambassador Extraordinary and Plenipotentiary/Envoy Extraordinary and Minister Plenipotentiary.
>
> The experience which We have had of X.Y.'s talents and zeal for Our service assures Us that the selection We have made will be perfectly agreeable to You; and that he/she will discharge the important duties of his/her Mission in such a manner as to merit Your approbation and esteem and to prove himself/herself worthy of this new mark of Our confidence.
>
> We therefore request that You will give entire credence to all that X.Y. shall communicate to You in Our name, more especially when he/she shall renew to You the assurances of the lively interest which We take in everything that affects the welfare and prosperity of the Republic of Z.
>
> And so We commend You to the protection of the Almighty.
>
> Given at Our Court of St. James's, the ..... day of ..... Two thousand and ..... in the ..... Year of Our Reign.
>
> Your Good Friend,
>
> (Signed) Elizabeth R.

5.3 The language of such Documents is a matter of 'common form'. The heritage of elaborate phraseology has been retained in the formal usage of the United Kingdom and of some other European countries, where it is felt to express with clarity and due emphasis ideas which have remained basic to diplomacy throughout the centuries. But while each country will tend to evolve its own characteristic style of address and some prefer simpler forms better reflecting contemporary moods and customs, the final phrase asking that credit may be given to all that the agent may say in the name of his sovereign or government is of universal application. This is what constitutes the essential part of a Letter of Credence.

Letters of Recall

5.4 Letters of Recall may take the form of a *Lettre de Cabinet* as follows:

> Sir My Brother
>
> Having occasion elsewhere for the services of My Trusty and Well-beloved X.Y., who has lately resided at Your Majesty's Court in the character of My Ambassador

Extraordinary and Plenipotentiary/Envoy Extraordinary and Minister Plenipotentiary I cannot omit to inform You of his recall.

(*Or,*)

My Trusty and Well-beloved X.Y., who has lately resided at Your Majesty's Court in the character of My Ambassador Extraordinary and Plenipotentiary/Envoy Extraordinary and Minister Plenipotentiary being now on the point of retiring from My Foreign Service, I cannot omit to inform You of the termination of his/her Mission in that capacity.

Having Myself had ample reason to be satisfied with the zeal, ability, and fidelity with which X.Y. has executed My orders on all occasions during his/her Mission, I trust that Your Majesty will also have found his/her conduct deserving of Your approbation and esteem, and in this pleasing confidence I avail myself of the present opportunity to renew to You the assurances of the invariable friendship and cordial esteem with which I am,

Sir My Brother/Madam My Sister,

Your Majesty's Good Sister

Elizabeth R.

Buckingham Palace

To My Good Brother/Sister The King/Queen of [Country]

Or of a *Lettre de Chancellerie,* as follows: **5.5**

Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith, &c., &c., &c.

To the President of the Republic of Z. Sendeth Greeting!

Our Good Friend! [Having need elsewhere for the services of] Our Trusty and Well-beloved X.Y. who has for some time resided with You in the character of Our AmbassadorExtraordinary and Plenipotentiary, [being now on the point of retiring from Our Diplomatic Service We have thought fit to notify to You the termination of his/her Mission in that capacity.] [We have thought fit to notify to You his Recall.]

We are Ourselves so satisfied with the zeal, ability, and fidelity with which X.Y. has executed Our orders on all occasions during his/her Mission that We trust his/her conduct will also have merited Your approbation, and in this pleasing confidence We avail Ourselves of the opportunity to renew to You the assurances of Our constant friendship, and of Our earnest wishes for the welfare and prosperity of the Republic of Z.

And so We commend You to the protection of the Almighty.

Given at Our Court of St. James's, the ..... day of ..... Two Thousand and ..... in the ..... Year of Our Reign.

Your Good Friend,

(Signed) Elizabeth R.

A number of concrete examples of credentials, etc. appearing in earlier editions of this work have been omitted. Their value as guidance to present-day practice **5.6**

has expired and they took up a lot of space. This is also true of the following *Lettre de chancellerie* but it would be a pity for such a jewel to be lost sight of.

> Par la Grâce dc Dieu,
>
> Nous Alexandre III, Empereur et Autocrate de Toutes les Russies, de Moscou, Kiow, Wladimir, Novgorod, Tsar de Casan, Tsar d'Astrakhan, Tsar de Pologne, Tsar de Sibérie, Tsar de la Chersonese Taurique, Tsar de la Géorgie, Seigneur de Plescow et Grand Duc de Smolensk, de Lithuanie, Volhynie, Podolie et de la Finlande; Duc d'Estonie, de Livonie, de Courlande et Semigalle, de Samogitie, Bialostock, Carelie, Twer, Jugotie, Perm, Viatka, Bolgarie et d'autres; Seigneur et Grand Duc de Novgorod-inférieur, de Czarnigow, Riasan, Polotzk, Rostow, Jaroslaw, Beloosersk, Oudor, Obdor-Condie, Witepsk, Mstislaw; Dominateur de toute la contrée du Nord; Seigneur d'Ibérie, de la Cartalinie, de la Cabardie et de la province d'Arménie; Prince Héréditaire et Souverain des Princes de Circassie et d'autres Princes montagnards; Seigneur de Turkestan; Successeur de Norvège, Duc de Schleswig-Holstein, de Stormarn, de Dithmarsen et d'Oldenbourg, etc., etc., etc.
>
> A la Très-Haute et Très-Puissante Princesse Victoire I[ère], par la Grâce de Dieu, Reine du Royaume-Uni de la Grande-Bretagne et d'Irlande, Impératrice des Indes, etc. salut!
>
> Très-Haute et Très-Puissante Reine, très-chère Sœur et très-aimée parente! Nous avons jugé à propos de rappeler Notre Conseiller Privé et Chevalier Baron Arthur Mohrenheim du poste de Notre Ambassadeur Extraordinaire et Plénipotentiaire qu'il a occupé jusqu'ici près Votre Majesté. En informant Votre Majesté de cette détermination, Nous La prions de vouloir bien congédier gracieusement Notre susdit Ambassadeur, étant persuadé, qu'en se conformant dans l'exercice de ses fonctions aux instructions que Nous lui avons données, il aura déployé tout son zèle pour entretenir les liens qui subsistent entre Nos deux Cours, et aura su meriter la bienveillance de Votre Majesté. Sur ce, Nous prions Dieu qu'Il ait Votre Majesté en Sa sainte et digne garde.
>
> Donné à Pétersbourg, le 8 février, 1884, de Notre Règne la troisième année.
>
> De Votre Majesté l'affectionné Frère et Cousin,
>
> Alexandre.
>
> (Countersigned) N. Giers.
>
> A Sa Majesté la Reine du Royaume-Uni de la Grande-Bretagne et d'Irlande, Impératrice des Indes.

Full Powers

5.7 A diplomatic agent to whom a particular negotiation is entrusted for the conclusion of a treaty or convention, or an agent who is deputed to take part in a conference for a similar purpose, requires as a general rule a special authorization, called a full power,[1] from the head of the State whom he represents; or, it may

[1] See Chapter **34**, paragraph **34**.9.

be, from its government, if the proposed treaty arrangement is to be between governments.

5.8 The use of Full Powers has a long history going back through the Middle Ages to the Roman *plena potestas* conferred on a proctor for legal transactions. It became in due course an established rule that only the bestowal of Full Powers gave an ambassador authority to commit his sovereign. The object of conferring them was to be able to dispense, as far as possible, with the long delays needed in earlier times for referring problems back to higher authority. Their use at the present day is a formal recognition of the necessity for absolute confidence in the authority and standing of the negotiator.[2]

5.9 In the case of a bilateral treaty, it is usual for the Full Powers of each signatory to be exhibited at the time of signature; in the case of a multilateral treaty, the duty automatically devolves upon the headquarters government, viz, that of the State wherein the treaty is signed, or the international organization under whose auspices the treaty is concluded; in the case of a conference a small subcommittee is often appointed[3] at the outset to receive and examine the Full Powers of the representatives of the various States taking part.

5.10 It is not, however, always the case that an actual exchange or transference of the original documents will take place. In some circumstances an inspection will suffice, and certified copies will be retained. That this was the custom in former times is shown from the practice that prevailed of publishing the text of the Full Powers conferred by the High Contracting Parties along with the treaty negotiated in pursuance of them.[4] But generally Full Powers, where given ad hoc, having served the purpose for which they were intended, are left with the government of the State, or with the international organization, wherein signature of

[2] A classic illustration of the importance of a clear definition of full powers and their relation to the instructions given to the negotiator is afforded by the events which led to Cardinal Richelieu's refusal to ratify the Treaty of Regensburg in 1630. His grounds for refusal were that the two French representatives, whose full powers had been intended apparently to apply only within the limits of their instructions, had gone far beyond what they were authorized to do, and had thus placed their sovereign in an unacceptable position. But it appeared that the Cardinal's thinking had changed with changed circumstances in the three months between the initial despatch of the negotiators and the opening of the discussions; and that the successive instructions he sent them proved more confusing than helpful. For a detailed reconstruction of the whole story and its background, see 'A *cause célèbre* in the history of treaty-making: The refusal to ratify the Peace Treaty of Regensburg in 1630', by D P O'Connell, in the *BYIL* (1968) 71. Professor O'Connell shows how this and other failures to ratify treaties in the first half of the seventeenth century led to greatly intensified scrutiny of the credentials and full powers of delegates to negotiations. 'Out of this caution,' he concludes, 'was born the modern international law of ratification.'

[3] See Chapter **34**, paragraph **34**.16.

[4] See Jenkinson, iii. 347.

the treaty takes place, and in this event they are preserved with the signed treaty in the archives of the State or organization concerned.

5.11 Formerly, when a congress was held under the superintendence of one or more mediators, the Full Powers of the Plenipotentiaries were handed to them for verification. At the conferences of Constantinople (1876–7) and Berlin (1884) the Plenipotentiaries appointed ad hoc alone produced Full Powers, which were held to be unnecessary in the case of the resident diplomatic agents who represented their governments on those occasions.

5.12 In the eighteenth century the King of England and the Emperor conferred Full Powers in the Latin language; France and Russia used French, Spain Spanish, and the United States English. For the definitive Treaty of Peace with the United States of 3 September 1783, the King's Full Power was also in English. Latin was used for this purpose as late at least as 1806, for the Full Powers given first to Lord Yarmouth, and afterwards to Lord Lauderdale in conjunction with him, and for the abortive peace negotiations at Lille with the French in the Napoleonic period.

5.13 At the present day the Full Powers issued to representatives for such purposes as the negotiation and signature of a treaty, or the settlement in a similar manner at a conference of some question of international concern, vary greatly in form, according to the particular constitution or the settled practice of the country which issues them. The form used in the United Kingdom for the signature of a treaty or convention between heads of state is that of Letters Patent, as shown in paragraph **5**.14 below, and the wording, it will be seen, follows in general that of the past though the use of Latin for such purposes has long been discontinued. Many countries adopt a similar formal style; in the case of others it may be simpler, and the phraseology employed may vary considerably, although a template for Full Powers is provided by the United Nations Treaty Secretariat and many States follow this model. Differences may exist also according to the degree of importance ascribed to the treaty, or whether it is to be concluded between heads of state or, on the other hand, between governments. The essential feature of all such documents is that they should show by their terms that the representative to whom they are issued is invested with all necessary authority on the part of the State concerned to take part in the negotiations pending, and to conclude and sign, subject if necessary to ratification, the treaty instrument which may result from these negotiations.

5.14 The form of special Full Power issued by the Court of St James's for the purpose of a treaty or convention between heads of state is as follows:

> Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the

Commonwealth, Defender of the Faith, &c., &c., To all and singular to whom these Presents shall come,

Greeting!

We hereby invest [name and position of the representative] with Full Powers to sign, on Our behalf in respect of Our United Kingdom of Great Britain and Northern Ireland, the [title of the Agreement].

In Witness Whereof We have caused Our Great Seal to be affixed to these Presents, which We have signed with Our Royal Hand.

Given at Our Court of Saint James's, the [day] of [month] in the Year of Our Lord Two thousand and [year] and in the Fifty-[ ] Year of Our Reign.

5.15 The following is the form of a general Full Power such as is at present held[5] by the Secretary of State for Foreign and Commonwealth Affairs, ministers of state, parliamentary under-secretaries, and the permanent representatives at the United Nations and the European Communities in order to enable them to negotiate and sign any treaty on behalf of the United Kingdom:

Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith, &c., &c., To all and singular to whom these Presents shall come,

Greeting!

We hereby invest [Rt. Hon. David Miliband, MP], Our Principal Secretary of State for Foreign and Commonwealth Affairs, with Full Powers to sign, on behalf of Our United Kingdom of Great Britain and Northern Ireland, subject, if necessary, to ratification, acceptance or approval, all treaties and other international instruments.

In Witness Whereof We have caused Our Great Seal to be affixed to these Presents, which We have signed with Our Royal Hand.

Given at Our Court of Saint James's, the [day] of [month] in the Year of Our Lord Two thousand and [year] and in the fifty-[year] of Our Reign.

(Signature) Elizabeth R.

5.16 In the case of an agreement between governments, the form of Full Power issued by Her Majesty's Secretary of State for Foreign and Commonwealth Affairs is as follows:

'[Name of the Representative, plus their position and any decorations] is hereby granted Full Powers to sign, on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, the [full title of the Agreement];

In Witness Whereof I, David Miliband, Her Majesty's Principal Secretary of State of Foreign and Commonwealth Affairs, have signed these presents.

[5] But see Chapter **34**, paragraphs **34**.9 and **34**.10 and Chapter **35**, paragraph **35**.50.

Signed and sealed at the Foreign and Commonwealth Office, London, the [day] of [December], two thousand and nine.'

(Seal)

(Signature of Secretary of State.)

5.17 A French example:

Le Président de la République Française,

Vu l'article 52 de la Constitution

Autorise

Monsieur Bernard Kouchner, Ministre des Affaires étrangères et européennes

à signer au nom de la République Française

La Convention sur l'interdiction des armes à sous-munitions

Fait à Paris, le 1 décembre 2008.

(Seal)

(Signed) Nicolas Sarkozy

Président de la République

Le Premier Ministre

(Signed) François Fillon

5.18 A United States example:

I invest Strobe Talbott, Deputy Secretary of State, or in his absence, John C. Kornblum, Assistant Secretary of State for European and Canadian Affairs, with full power and authority for and in the name of the Government of the United States of America to sign the Treaty Between the United States of America and the Republic of Latvia on Mutual Legal Assistance in Criminal Matters, together with any related documents, the said Treaty to be transmitted to the President of the United States of America for his ratification by and with the advice and consent of the Senate of the United States of America.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed at the city of Washington, in the District of Columbia, this tenth day of June, 1997.

[signature Madeleine Albright]

Secretary of State

[**SEAL**]

Book II

DIPLOMATIC RELATIONS

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6

LEGAL FRAMEWORK AND FUNCTIONS OF DIPLOMATIC MISSIONS

Recognition of States and Establishment of Diplomatic Relations	6.3	**Where Permanent Missions are not Established between Two States**	6.15
Recognition of New Governments and Diplomatic Relations	6.10	**Functions of a Diplomatic Mission**	6.17
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6.1 Under long established principles of international law now codified in Article 2 of the Vienna Convention on Diplomatic Relations, the establishment of diplomatic relations between States and the establishment of permanent diplomatic missions take place by mutual consent. The right to send and receive diplomatic agents flows from recognition as a sovereign State and was formerly known as the right of legation (*ius legationis*). The recognition of a new State, the establishment of diplomatic relations with that State, and the establishment of a permanent diplomatic mission in that State are three distinct steps. It may however sometimes happen that two of the three steps occur simultaneously or in immediate sequence, which can give rise to confusion between them.

6.2 It is in modern practice highly exceptional for two States to recognize each other without formally establishing diplomatic relations—and such a situation usually indicates extreme tension or coolness between them. The United Kingdom for example recognized North Korea as a State some years before the establishment of diplomatic relations between the two in December 2000. The United States also recognized North Korea without establishing diplomatic relations with it.[1] In 1980 the United Kingdom offered to establish relations with Albania, but the offer was accepted only in1991, while the United States made a similar offer in 1973 which was also rejected by Albania. By contrast, it is now common for two

[1] Hansard HC Debs. 20 March 1995 WA cols 43–46; Department of State Guidance on Diplomatic Relations 1995.

States to establish or to maintain diplomatic relations without having permanent missions in each other's territory.

Recognition of States and Establishment of Diplomatic Relations

6.3 It is common, though not universal practice, for the government of a State to issue a formal statement on recognizing another—usually newly established—State and such a statement may offer to establish diplomatic relations with the new State, or be followed very shortly by such an offer. Sometimes however the stages are merged so that the offer to establish relations, or a jointly released statement by both States of their intention to establish relations, in effect constitutes implied recognition by the old State of the new one. In earlier centuries it was common for States to conclude a treaty formally setting out the right to send and receive diplomatic missions, but this practice is now obsolete.

6.4 Where the birth of the new State takes place without the consent of the State from whose territory it is being formed, premature recognition and establishment of diplomatic relations by other States will be regarded by the parent State as unlawful and in some circumstances as an intervention in its own internal affairs. Thus in February 1991 the Soviet Union protested at a decision by Iceland to recognize Lithuania—then still regarded by Moscow as a constituent Republic of the USSR—and to establish diplomatic relations with it. By September 1991 however constitutional processes had been completed by the USSR State Council recognizing the independence of the former Soviet Republics, and ministers of foreign affairs of the Member States of the European Community met the ministers of foreign affairs of the three Baltic States to mark the restored sovereignty and independence of the Baltic States and to seal the establishment of diplomatic relations with all of them. In 1998, by contrast, Chechnya attempted to assert a claim to independence from Russia by appointing ambassadors, but these were not accepted by other States and were declared by Russia to be illegal.

6.5 Following the secession of Bangladesh from Pakistan in 1971, the new State of Bangladesh was recognized by the United Kingdom, by India, by the Soviet Union, and within a few weeks by numerous other States. In protest at the recognition by Commonwealth governments of Bangladesh, Pakistan on 30 January 1972 withdrew from the Commonwealth. Pakistan did not recognize Bangladesh as a sovereign State until 1974.

6.6 Following the unilateral declaration of independence from Serbia by Kosovo on 17 February 2008, the United States on the following day recognized it as a 'sovereign and independent State'. The prime minister of Serbia immediately recalled

the Serbian ambassador to Washington, claiming that the US action 'violated international law', and the position of Serbia was supported by other States including Russia, China, India, and Spain.[2] In the absence of a common position among European Union foreign ministers on the recognition of Kosovo, a number of Member States including Germany, Italy, France, and the United Kingdom made formal statements of recognition. The UK Foreign Secretary David Miliband said

> The plan is to do it this evening and diplomatic relations will then be established . . . and in the course of the next days and weeks all the terms of full diplomatic representation will be put into place.

6.7 The disappearance of a sovereign State—usually on fusion with another State—is on the same principles followed by the ending of its separate diplomatic relations with other States as they recognize the new situation. On the reunification of Germany in 1989, the separate East German embassies were taken over by the newly reunited Germany. Other States, if they retain former embassy premises in a city which is no longer the seat of government, may transform them into consulates—or perhaps seek the permission of the government of the newly unified State for their transformation into offices forming part of the mission to that State. Once again it is recognition which forms the key to any change in diplomatic relations. When Iraq purported to annex Kuwait in 1990, President Saddam Hussein ordered the closure of embassies of other States in Kuwait. Other States however, fortified by a Security Council resolution,[3] refused to comply on the basis that closure would have implied acquiescence in the disappearance of Kuwait as a separate sovereign State. Even where diplomats were withdrawn during the subsequent conflict for reasons of security, other States continued to regard themselves as maintaining diplomatic relations with Kuwait.

6.8 In September 1973, following the recognition by the United Kingdom of North Vietnam as a State, the two governments agreed to enter into diplomatic relations at the level of ambassadors and the former UK consulate-general in Hanoi became an embassy. The government of North Vietnam however refused to accept the credentials of the officer accredited a few months later as ambassador and after a year he was withdrawn. In July 1975 the UK, following the Communist victory in the South, recognized the Provisional Revolutionary Government as the government of South Vietnam and two months later the government of North Vietnam accepted the appointment as ambassador to North Vietnam of the officer who had been acting as British chargé d'affaires in Hanoi. In July 1976 the

[2] The legality of recognition turned on the terms of Security Council resolution 1244 (1999) as well as on the entitlement of the people of Kosovo to self-determination.

[3] SC resolution 667 (1990).

UK recognized Vietnam following the reunification of North and South Vietnam into a single State having its capital in Hanoi, and the former British embassy in Saigon became a British consulate.

6.9 The sovereignty of Iraq was regarded as falling into abeyance following the invasion and occupation of March 2003 and as being formally restored in June 2004. On the restoration of its sovereignty a number of other States, including the United States, Australia, and Denmark, immediately proposed the resumption of diplomatic relations with Iraq.

Recognition of New Governments and Diplomatic Relations

6.10 Where a change of government within a State takes place, continuance or otherwise of diplomatic relations between that State and others also depends on whether the new government has been recognized. When the change of government is constitutional, for example as a result of free elections, diplomatic relations with other States will continue as a matter of course. Fresh credentials may be required by ambassadors from other States where the new government results from or entails a different head of state. Where a change of government results from conflict or revolution, diplomatic relations may continue or there may be a hiatus, and the appointment of new ambassadors is likely. If ambassadors and diplomats from other States remain at their posts pending clarification of the position they are not permitted to have official dealings with the new government since such contacts in the absence of a disclaimer would imply recognition. Diplomats may however if so authorized have informal dealings with one or other party to a civil conflict particularly on such matters as the safety and the protection of the property of their own nationals.[4]

6.11 Under older practice States might expressly recognize a fundamental change in the government of another State. On the death of General Franco in November 1975, for example, the British government immediately and formally recognized the change resulting from the constitutional arrangements in Spain for restoring the monarchy. The Duke of Edinburgh represented the Queen at the service in Madrid seven days later to celebrate the accession of King Juan Carlos to the throne of Spain.

6.12 In Cambodia, by contrast, the victory in 1975 of the Khmer Rouge resulted in a much more confused situation. Having taken over control of Phnom Penh, the Khmer Rouge warned all foreign diplomatic missions to cease functioning.

[4] Oppenheim, 9th edn (eds Jennings and Watts), paras 42–45; 465.

France closed its diplomatic mission, leaving a consul in charge of French interests although for some weeks the building continued to provide refuge for diplomats and other foreign nationals. Other States also closed their diplomatic missions. Soon afterwards it became clear that the Khmer Rouge were in control of the greater part of the territory of Cambodia, and France, the United Kingdom, and other States formally accorded them recognition as the government of Cambodia and offered to resume diplomatic relations. The new government however ignored these overtures, ignored offers by former Cambodian diplomats to serve the new regime, and ignored offers in foreign capitals to arrange for the protection or the disposal of Cambodian former embassy premises in these capitals. For many years the Khmer Rouge government had no diplomatic relations with Western States.

6.13 Modern practice is for other States to make no express statement recognizing a new government and for the continuation or resumption of relations—whether through the same ambassador or through a replacement appointment—to take place as inconspicuously as possible. The United Kingdom fell into line with this practice in 1981 following a review of practice in other European States and more generally.[5]

6.14 Where a government—even one apparently in control of a State—has not received recognition from other States it will be unable to establish or to continue diplomatic relations with these other States and its envoys—like those from Chechnya mentioned above—will not be received abroad, accorded any diplomatic status, or given control of the financial assets or property such as embassy premises belonging to the State. The Taleban regime, even while in apparent control of Afghanistan, was recognized as a government only by Pakistan, Saudi Arabia, and the United Arab Emirates. Representatives purporting to act as diplomats in European capitals were simply disregarded by the governments of the relevant States, and in October 2001 a Taleban 'embassy' in Frankfurt was closed down by German police who found a list of enemies of the Taleban targeted for killing.[6]

Where Permanent Missions are not Established between Two States

6.15 A State establishes a permanent diplomatic mission in another State with which it is in diplomatic relations only where it decides, first, that a permanent mission

[5] Hansard HC Debs. 25 April 1980 WA cols 277–79; 23 May 1980 WA col 385.
[6] *The Times*, 31 October 2001.

is necessary for the conduct on its behalf of some or all of the diplomatic functions described below, and secondly, that conditions in the receiving State would permit its representatives to exercise such functions safely and effectively. Embassies are financed from the resources of the sending State which are in most cases subject to stringent controls and in some cases to public and parliamentary scrutiny of expenditure. So a sending State which has limited political or commercial interests in another State, and few of its own nationals resident in or visiting that State, may well decide that it does not require a permanent embassy there. Where the receiving State is in the midst of armed conflict, civil disorder, or a high level of terrorist threat, other States will in general not set up permanent missions and may withdraw missions already in existence.

6.16 In such situations there is a range of more limited options available to the two States for the conduct of their relations:

(1) diplomatic contacts in the capital of a third State or in the margins of international organizations—in particular the United Nations;
(2) occasional special missions sent to discuss specific issues of mutual interest (see Chapter **13** below);
(3) multiple accreditation—more usually the sending of a single ambassador to two or more receiving States but less frequently the sending by two or more States of a single ambassador to one receiving State. The rules for multiple accreditation are set out in Articles 5 and 6 of the Vienna Convention on Diplomatic Relations. A receiving State may object to receiving an ambassador who is also accredited to another State or who is sent by more than one State;[7]
(4) protection of the interests of the sending State by a third State which is represented in the receiving State. Where a mission has been recalled (perhaps for reasons of economy or security) or diplomatic relations have been broken, the rules are set out in Article 45 of the Vienna Convention and are described in detail in Chapters **15** and **16** below. Where the sending State has not previously sent a permanent mission, the arrangement is normally regarded as temporary and the rules are contained in Article 46 of the Convention. The consent of the receiving State is required for this arrangement.
(5) consular relations may be continued or established between the two States in the absence of a permanent diplomatic mission and even in the absence of recognition of the receiving government or of diplomatic relations. For many

[7] In 1825, for example, Canning as British Foreign Secretary rejected a proposal by Argentina to send a minister who was also accredited to France, saying 'Je crois. . . que ce n'est pas trop pour le cérémonial, d'exiger un ministre pour l'Angleterre seule'.

years before 1973 the United Kingdom maintained a consulate in Hanoi without recognizing North Vietnam as a State and in Taiwan without recognizing the authorities in Taiwan as the government of China. This is explained more fully in Chapter **18** below.

Functions of a Diplomatic Mission

6.17 The functions of a diplomatic mission, which are set out in Article 3 of the Vienna Convention on Diplomatic Relations, are to represent the sending State, to protect its interests and those of its nationals, to negotiate with the government of the receiving State, to report to the government of the sending State on all matters of importance to it, and to promote friendly relations in general between the two States. The mission must seek to develop relations between the two countries in economic, financial, labour, cultural, scientific, and defence matters. Although there have been important changes in the ways in which diplomatic relations are conducted—many due to developments in communications and travel—the basic functions themselves have hardly altered over the past three hundred years. The list in Article 3 is however not exclusive, so that novel forms of cooperation, such as police or judicial liaison over extradition, possible drug trafficking, or child abduction, may be accepted as properly diplomatic in character. The functions of diplomatic missions must be distinguished from 'diplomacy'—a broader term denoting the conduct of official relations by peaceful means on behalf of States.

6.18 In carrying out all of its functions the mission acts on the instructions received from the government of the sending State and on its behalf. The function of 'representing the sending State' is listed first because it describes not merely ceremonial appearances and acts by an ambassador but embraces all of the subsequently named functions. The more specialized functions such as those relating to scientific research or defence cooperation may be carried out by or with the assistance of specially trained members of the diplomatic service or by officers belonging to the armed services of the sending State or to other ministries. The latter are often seconded to the diplomatic service of the sending State and are in any event given diplomatic appointments (such as defence attaché) where they are serving on a long-term basis.

6.19 The development of economic and financial relations by a mission is in larger posts carried out by a commercial section of the embassy. This work is concerned with the promotion of trade between the two States and with the promotion and protection of direct investment between them. It may not be carried out with the purpose of generating profit, because of the legal prohibition, now reflected in

Article 42 of the Vienna Convention on Diplomatic Relations, on the carrying out by diplomatic agents of professional or commercial activity for personal profit. The distinction between promotional and profit-making activity often gives rise to difficulties with the host State authorities in regard to such questions as tourist offices, or the selling of tickets for holidays or for cultural or social events on embassy premises. In addition to the questions of whether such activities are proper functions of the embassy and proper uses of mission premises there is the further question as to whether they are covered by the immunity of the sending State which under modern international law does not cover commercial activities. It must be stressed that the fact that a particular enterprise—such as an investment agency or a tourist or medical office—is not accepted by the host State as carrying out a diplomatic function does not imply that it is not legitimate or governmental in character.

6.20 A diplomatic mission is required to carry out all of its functions in accordance with international law and also (except where it benefits from a specific exemption) in accordance with the laws and regulations of the receiving State. Article 3 of the Vienna Convention expressly states that in protecting the interests of the sending State and of its nationals the mission acts within the limits permitted by international law because of the particular sensitivity of the mission's acts intended to protect its national interests and the need in this context for its conduct to take account of the duty of diplomats under Article 41 of the Convention not to interfere in the internal affairs of the receiving State. The balancing of the right of an embassy to protect the interests of its own nationals and, more generally, human rights, and its duty not to interfere in the internal affairs of the host State has in recent years given rise to numerous diplomatic disputes, particularly, though not exclusively, in countries which strictly limit freedom of speech and assembly. An ambassador who offers refuge within his embassy premises to fugitives from local law enforcement officers may for example argue that he is justified in giving humanitarian protection, but the receiving State may take the position that such action amounts to intervention in its own internal affairs and is not permitted under general international law. These problems are considered more fully in Chapters **8** and **9** below.

Performance of Consular Functions by Diplomatic Missions

6.21 Article 3 of the Vienna Convention on Diplomatic Relations makes clear that the Convention does not prevent the performance of consular functions by diplomatic missions. In modern practice it is very common for embassies to have a consular section performing consular functions and for some of the diplomats and junior staff of the mission also to be given a consular appointment. The existence

of diplomatic relations normally implies the existence of consular relations, although, as stated above, consular relations do sometimes exist in the absence of diplomatic relations. Some States however do not organize their external services so as to permit their own diplomatic agents to carry out consular functions or do not accept that embassies of other States may perform consular functions in their territory. The position is therefore complex, though it has been clarified to some extent by the 1963 Vienna Convention on Consular Relations.

6.22 There is no clear dividing line between diplomatic and consular functions. Most of the functions of diplomatic missions set out above may also be exercised by consular posts. Consular posts also exercise a number of mainly administrative or legal functions (such as registration of births, deaths, and marriages, issuing passports and visas, or assistance to ships and aircraft in transit) which could broadly be regarded as protection of the interests of nationals of the sending State but are not normally carried out by embassies. The key distinction lies in whether the function is carried out through contacts with the central government, usually the ministry of foreign affairs of the receiving State (diplomatic functions) or through contacts with local authorities such as police, prison, or commercial officials (consular functions).

6.23 In the absence of a specific local bar, diplomatic agents may exercise consular functions on an occasional basis without the specific authority known as an exequatur. But a diplomatic agent doing this on a regular basis must be notified to the government of the receiving State and should preferably also be given a consular appointment. An individual with a dual appointment will address the appropriate authorities depending on the capacity in which he is acting. Regardless of the capacity in which he is acting he will remain entitled to the diplomatic immunities consequent on his diplomatic status.

6.24 Consular functions are described in greater detail below, in Chapters **19** and **20**.

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7

FORMAL ASPECTS OF DIPLOMATIC RELATIONS

Selection of Heads of Mission	7.5	**Control of the Size and Location of Diplomatic Missions**	7.21
Agrément for Heads of Mission	7.8	**Classes and Precedence among Heads of Mission**	7.25
Appointment of the Staff of the Mission	7.12	**Chargés d'Affaires**	7.31
Nationality of Diplomatic Staff	7.15		
Multiple Accreditation	7.18		

7.1 The initial selection of its ambassadors and, below them, the members of the staff of a diplomatic mission, is a matter for the law and practice of each State. Most States entrust the conduct of their diplomatic relations with other States, at least below the rank of ambassador, to a professional diplomatic service. The law and practice varies between different States on such matters as whether diplomatic posts are open to persons of other nationalities and on the personal requirements for appointment. Formerly it was common for States to maintain specialized services for consular and commercial matters and the United Kingdom, for example, maintained regional services such as the China Consular Service and the Levant Service for posts in the Middle East. The modern practice however is for States to maintain a unified diplomatic and consular service with, at least in theory, complete interchangeability in regard to personnel, functions, and geographical area of work. Requirements as to educational or specialized professional qualifications and as to character are common, but laws against discrimination in many countries ensure that selection to diplomatic posts cannot be limited on grounds of race, religion, or sex. Restricting appointment to nationals of the appointing State however, since it serves as some guarantee of allegiance and loyalty, remains extremely common, and in some States it is a constitutional or legal requirement. In the United States, for example, the Foreign Service Act 1980 provides that only US citizens may be appointed to diplomatic

posts abroad.[1] Posts in the British Diplomatic Service are restricted to British citizens and there are also requirements for recent residence in the United Kingdom.[2]

7.2 Beyond these formal restrictions, States are likely to apply tests of aptitude for a diplomatic career in such matters as administrative capability, negotiation and drafting skills, and resilience under stress. Extensive language skills are in some countries no longer a prerequisite, since training can be provided, but aptitude for learning difficult languages may well be assessed and many European diplomatic services continue to require extensive knowledge of two foreign languages, one invariably English. Entry to a diplomatic career is in most States highly sought after so that searching tests may be used for purposes of selecting the best qualified and most suitable candidates. In highly developed countries the process of recruitment for overseas service is kept under almost constant review in the light of the changing needs of the State.

7.3 Bismarck provided a concise summary of what is expected of a diplomat in saying: 'His work consists of practical intercourse with men, of judging accurately what people are likely to do in given circumstances, of appreciating accurately the views of others, and of accurately presenting his own'. And as to the qualities of character sought when selecting from candidates for a diplomatic service it must be stressed that diplomacy is not a career for the compliant. It often imposes on an officer the duty of defending the interests of his country in places not of his own choice, where he must be prepared to withstand the erosion of his health by uncongenial climates. He must also withstand the moral attrition to which he may be exposed in the front line of international politics while displaying the standards and values which his sending State seeks to uphold and to promulgate abroad.

7.4 Sir Henry Wotton, ambassador of King James I of England to Venice, is perhaps best remembered among diplomats for his witticism that '[a]n ambassador is an honest man, sent to lie abroad for the good of his country'. The story is in truth an excellent example of the dangers for a diplomat of joking in a language which is not his mother tongue (since the ambiguity in the English word 'lie' did not exist in the Latin translation used by Sir Henry) and when reported some eight years later to King James led to Wotton never being employed by the King again. Sir Henry himself later advised a prospective ambassador that '. . . to be in safety himself and serviceable to his country, he should always and upon all occasions

[1] Public Law 96-465, 22 USC 3901.

[2] The requirements are set out in the Foreign and Commonwealth Office website: <http://www.fco.gov.uk>.

speak the truth'. Sir Harold Nicolson in his book *Diplomacy* maintained that the qualities of an ideal diplomat were truth, accuracy, calm, patience, good temper, modesty, and loyalty.[3]

Selection of Heads of Mission

7.5 Ambassadors and other heads of mission are in many States selected not only as being the best qualified on personal grounds for appointment to a particular diplomatic post but also for political reasons. This is most apparent in the case of the United States where Article II Section 2.2 of the Constitution provides that the President 'by and with the advice of the Senate, shall appoint ambassadors, other public ministers and consuls'. There is a long tradition of appointing political supporters of the party whose nominee has been elected President, and the practice has continued at least in regard to senior and hence more desirable appointments such as the main European and other Western posts. Under President Reagan it was said that 40 per cent of senior diplomatic posts were held by political appointees, leaving many senior professionals within the State Department frustrated at being assigned to the most uncongenial posts as ambassador or in playing second fiddle to a political appointee.

7.6 In the United Kingdom such political appointments are by contrast rare but not at all unknown. In 1940 in the early stages of the Second World War the former Foreign Secretary, Lord Halifax, was appointed as ambassador to Washington and remained in that post for six years. In 1961 Lord Harlech was selected by Prime Minister Harold Macmillan as ambassador to Washington because of his close relationship with President Kennedy and in 1968 Prime Minister Harold Wilson sent Sir Christopher Soames, a former cabinet minister, to Paris. In 1977 the new Foreign Secretary David Owen recalled a career ambassador from Washington and replaced him with the son-in-law of the then Prime Minister James Callaghan and more recently two former UK cabinet ministers have been sent to Pretoria and Canberra.

7.7 Given the nature of the duties and functions of an ambassador and the special need in many cases to appoint an individual who not only best represents the sending sovereign but has personal links to the head of the receiving State, there can be no standard way for States to select their ambassadors. In different ages and in different countries, advocates and actors, priests and noblemen, merchant princes, cultured scholars, and men of wealth have all found favour as chosen

[3] (2nd edn, Oxford University Press, 1939). On the systems of selection in the United Kingdom see, in particular, J Dickie, *Inside the Foreign Office* (Chapmans, 1992) ch II 'The Professionals'.

ambassadors. A modern diplomatic service is staffed with many supporting professionals from linguists and lawyers to cipher clerks and security officers. But at the level of ambassador the flexibility permitted to each State in its choice well reflects the variety of its political relations with other States.

Agrément for Heads of Mission

7.8 Article 4 of the Vienna Convention on Diplomatic Relations requires a sending State to ensure that the agrément of the receiving State has been given for the person it proposes to appoint as head of its mission to that State. If the receiving State refuses agrément, it is not obliged to give reasons. Both rules reflect long-standing state practice which—with some resistance from the United States and from the United Kingdom—was accepted as customary international law by the 1930s. The requirement is justified by the need for a head of mission, in order effectively to conduct diplomatic relations between two States, to be personally acceptable to both of them.

7.9 The request for approval is normally made confidentially through the most convenient diplomatic channel—most usually by the retiring ambassador to the head of the receiving State's protocol department or foreign ministry, though occasionally by the minister of foreign affairs of the sending State to the ambassador of the receiving State, or rarely and directly by one head of State or minister to another in a third State or at the United Nations in New York. It is usual for a curriculum vitae to be supplied for the proposed ambassador. Occasionally a sending State may supply more than one name and leave the choice to the receiving State. Refusals are usually given orally and are not made public, but the receiving State is not legally precluded from making the fact or the grounds of its rejection public.

7.10 Delay in giving agrément or rejection of a proposed appointment may relate to previous postings, conduct, or personal characteristics of the individual, it may be a sign of strained relations between the two States or occasionally to a combination of both those factors. In 1885 the proposed United States envoy to Rome, Mr Keiley, whose case was important in the establishment of modern practice, was first rejected by the King of Italy on account of the political implications of a speech he had made at a meeting of Roman Catholics in Virginia where there had been protest at the annexation of the Papal States by Italy. Subsequently his appointment to Vienna was rejected by the Austro-Hungarian government as advance agrément had not been sought by the United States, because of his public statements and also because the fact that he was wedded to a Jewish wife by civil ceremony would make his position in Vienna 'untenable and intolerable'.

In 1977 Greece delayed agrément for Mr William Schaufele as United States ambassador because of remarks he had made during his confirmation hearing before the US Senate relating to the dispute between Greece and Turkey in the Aegean Sea.[4] Kuwait in 1983 rejected the proposed appointment by the United States of a head of mission who had previously served for three years as consul-general in Jerusalem.[5] Suspicion of involvement in criminal and in particular terrorist activity, in espionage, or in violations of human rights may also be a ground for refusal. The Iranian government declined agrément to David Reddaway the British nominee for the post of ambassador to Tehran in 2002 accusing him of being a spy. The British government however stated publicly that Mr Reddaway was not Jewish and was not an intelligence officer and responded by downgrading the status of the Iranian ambassador in London—so this rejection should properly be regarded as a sign of the difficult relations between the two States.

7.11 Even if agrément has been given, it may be withdrawn if the proposed head of mission has not actually arrived in the territory of the receiving State. In 1968, for example, Saudi Arabia withdrew its agrément to the appointment of Sir Horace Phillips as United Kingdom ambassador on grounds of his Jewish origins. The government of Saudi Arabia had in fact been aware of Sir Horace's Jewish origins and its change of heart resulted from these being made public in the British *Jewish Chronicle*.[6]

Appointment of the Staff of the Mission

7.12 By contrast with the position of heads of diplomatic missions, the general rule is that no advance approval from the receiving State is required for members of the staff of the mission of whatever rank. Article 7 of the Vienna Convention on Diplomatic Relations provides that the sending State may 'freely appoint the members of the staff of the mission'—but there are exceptions in the case of multiple accreditation, in the case of staff who are not nationals of the sending State and where the staff of the mission exceeds what is 'reasonable and normal'. These exceptions are discussed below. The receiving State may also, under Article 7, require the names of defence attachés (military, naval, or air) to be submitted in advance for approval.

[4] (1977) *RGDIP* 827.
[5] (1984) *RGDIP* 244.
[6] J Dickie, *Inside the Foreign Office*, 178–80.

7.13 The right freely to appoint diplomatic staff is taken to include the right for the sending State to dismiss such staff, and the right of mission staff to challenge dismissal or discriminatory treatment by the sending State is shown by court cases in many countries to be extremely limited.[7] The sending State may also as a general rule determine whether each member of its mission staff should be classified as diplomatic staff, administrative and technical staff, or service staff. Since this classification has important implications for the privileges and immunities of individual staff members, some States—in particular the United States—have made efforts to scrutinize individual appointments by reference to the known duties performed and in case of suspected abuse to request that an individual be re-assigned to a more appropriate category. The sending State is also entitled to choose the title accorded to particular members of staff, and although these titles usually conform to standard diplomatic practice (minister; counsellor; first, second, and third secretaries; attachés are the usual ranks among diplomatic staff) there are exceptions. Particular difficulty was caused by Libya which in 1979 announced that its diplomatic missions would be designated as 'People's Bureaux' and that members of its staff were no longer diplomats. This decision led to prolonged exchanges in a number of capitals as a result of which Libya accepted generally that foreign governments were entitled to make their own determinations, classifying Libyan People's Bureau staff for purposes of conferring appropriate protection, privileges, and immunities on them.[8]

7.14 Under Article 10 of the Vienna Convention on Diplomatic Relations there are extensive requirements to notify the ministry of foreign affairs of the receiving State of the appointment, status, and final departure of members of a diplomatic mission. These notifications are used by the ministry of foreign affairs in the context of establishing entitlement to privileges and immunities for individuals (and will be further considered below in those contexts) and also in order to compile a local Diplomatic List and in some capitals to issue diplomatic identity cards. Neither entry on the Diplomatic List nor the possession of a diplomatic identity card are conclusive evidence of entitlement to privileges or immunities, but they have social and practical uses for individual members of diplomatic missions.

[7] For details of such cases see E Denza, *Diplomatic Law* (3rd edn, Oxford University Press, 2008) 62–8.

[8] See (1980) *DUSPIL* 286; UK House of Commons Foreign Affairs Committee 1st Report, 1984–5 paras 69–72.

Nationality of Diplomatic Staff

7.15 As already explained, it is highly unusual for a State to propose for a diplomatic appointment a person who is not one of its nationals, but international law does permit such an appointment. Article 8 of the Vienna Convention on Diplomatic Relations says merely that 'Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State'. The appointment of a diplomat who is a national of the receiving State requires under Article 8 the consent of that State which may be withdrawn at any time. States are also permitted to reserve this right of veto with regard to nationals of a third State who are not also nationals of the sending State—though it is very unusual for this to be done.

7.16 In practice, most appointments of persons having the nationality of the receiving State are of dual nationals who are also nationals of the sending State. This practice is particularly common among States which are members of the British Commonwealth. The United Kingdom government has made clear that it sees no problem in such appointments. Appointments of diplomats having only the nationality of the receiving State are by contrast highly exceptional—though this is mainly due to the restrictions usually applied by appointing States rather than to refusal of permission by receiving States.

7.17 It should be stressed that the question of whether such diplomats may be appointed and accepted is a separate question from the privileges and immunities to which they are entitled if appointed, which are described in Chapter **10** below. It should also be made clear that the limitations on appointment of nationals of the receiving State apply only to diplomatic staff and not to junior staff of the mission. The appointment of local nationals to embassy posts such as administrators, clerks, translators, cooks, and drivers has many advantages in terms of their familiarity with the local language and customs as well as reduced costs for the sending State and it is in practice extremely common. Staff in such positions are not normally dealing with sensitive information or carrying out political functions where their loyalty to the sending State might cause difficulties or risks.

Multiple Accreditation

7.18 As explained in Chapter **6** above, where permanent missions are not established between two States, one of the alternatives which may be chosen on grounds of security or lower cost is multiple accreditation. This may take the form of sending a single ambassador or diplomat to more than one State (Article 5 of the Vienna

Convention on Diplomatic Relations) or the sending by two or more States of a single ambassador to one receiving State (Article 6 of the Convention). When the United Kingdom and Mongolia agreed in 1963 to exchange ambassadors, the UK head of mission to China (then chargé d'affaires *en titre*) was also appointed as British ambassador to Ulan Bator. The Mongolian ambassador to Poland was also accredited as Mongolian ambassador to the United Kingdom. Following the recognition by the United Kingdom in 1992 of a number of former Soviet Republics as independent States, eight of these were initially covered by cross-accreditation of the UK ambassador in Moscow.[9] Both forms of multiple accreditation have long been in use in diplomatic relations. The first presents no special problems, since ambassadors are not required to reside continuously in the receiving State and are permitted to establish a mission headed by a chargé d'affaires *ad interim* in each capital where they are non-resident. The sending State must under Article 5 give due notification of the proposed arrangement to both, or to all receiving States, and each of them may expressly object. Silence may however probably be taken as an indication of acquiescence.

7.19 It is also permissible for an ambassador or diplomat concurrently to act as representative of his sending State to an international organization and this is common in Rome (where some ambassadors to Italy are also representatives to the Food and Agricultural Organization), in Vienna (concurrent representation to the International Atomic Energy Agency), and in Brussels (concurrent representation to the European Union and/or to NATO).

7.20 For practical reasons the second form of multiple accreditation is used much less frequently. The arrangement can only work well where the States sending a single ambassador have close political relations since otherwise the ambassador will find it difficult to act in the interests of both and the diplomatic message sent may be confusing. There may well be problems of confidentiality of archives and of information reported and—except where the arrangement is a merely temporary one—there may be a fear among the participant States of loss of sovereignty or prestige. Sharing an ambassador may however offer advantages of economy in the case of small States which are close both geographically and in political outlook—there is for example in London a diplomatic mission which represents a number of separate Eastern Caribbean States. European Union Member States in a number of capitals outside the Union have what are termed co-location projects in which premises as well as certain functions of reporting and protection are shared, but these do not involve the appointment of a single ambassador. These joint enterprises among Member States are described below

[9] Hansard HL Debs. 5 February 1992 col 271.

in Chapter 27, paragraph 27.16. Proposals in the Treaty of Lisbon for a European Union external action service which would work in close co-operation with embassies of Member States are described below, in paragraph 27.28.

Control of the Size and Location of Diplomatic Missions

7.21 A further possible limitation on the right of a State freely to appoint staff of its diplomatic mission is the right of a receiving State, under Article 11 of the Vienna Convention on Diplomatic Relations, to require that the size of the mission should be limited to what it considers 'reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission'. Specific agreements between States as to the size of the mission are highly exceptional, and the power to limit the size of a mission is in practice used only where relations with the sending State are strained or there is concern about abuse such as espionage. One well-known case was the ceiling imposed by the United Kingdom in 1971 on the embassy and other agencies of the Soviet Union following the expulsion by Sir Alec Douglas-Home, then Foreign Secretary, of 105 Soviet diplomats and other officials for 'inadmissible activities' (the standard euphemism for espionage). The UK maintained that the Soviet Union had no 'need' for staff beyond the numbers who were left after the expulsions since those expelled had not been performing diplomatic functions, and on each subsequent occasion when a Soviet official was expelled for 'inadmissible activities' the ceiling was reduced by one. This action was followed by the placing of reciprocal limits on the British embassy in Moscow.[10]

7.22 The United States Congress also sought in 1985 to place a ceiling on the Soviet diplomatic mission in Washington so as to achieve parity with the numbers in the US embassy in Moscow. On this occasion however the Soviet Union responded to the US expulsions by requiring the removal of junior staff who were Soviet nationals, so that the US were forced, in order to comply with the new ceiling, to send US nationals as chauffeurs and cleaners to Moscow instead of as diplomatic staff.[11]

7.23 The likelihood of retaliation together with the unpredictability of the form which it may take has therefore meant that in spite of publicly stated determination by a number of States to make more use of the power to place ceilings on foreign

[10] See J Dickie, *Inside the Foreign Office*, ch IX 'Spies and Diplomacy' at 203–8.
[11] (1981-8) *DUSPIL* 910.

embassy numbers in order to limit abuse of diplomatic immunity,[12] the power has in fact been little used.

7.24 A further possible control of foreign embassies lies in the prohibition on the sending State, under Article 12 of the Vienna Convention on Diplomatic Relations, from establishing offices forming part of the mission in 'localities' away from where the mission is established unless prior express consent has been given. The general practice is for embassies to be set up in the capital or seat of government of the receiving State and to follow it if it moves. Where the government of the receiving State is situated in more than one city (for example The Hague and Amsterdam in the case of the Netherlands), embassies will normally follow the location of the ministry of foreign affairs because of the requirement that they should conduct official business with that ministry unless there is special agreement otherwise. There may be political or geographical restrictions on embassy location (as, for example, with Jerusalem and with the Holy See). There may be local requirements—for example where the receiving State moves its capital as Brazil, Nigeria, Germany, and Myanmar (Burma) have all done in recent years. The United States permits foreign embassies to maintain in New York a single commercial or financial diplomatic officer in offices forming part of their mission premises. In large States there are of course likely to be foreign consulates in cities outside the capital and there is no bar under international law to other States setting up commercial offices, information offices, tourist offices, cultural centres, or libraries in other cities or towns in the receiving State—but these will not be accepted as part of the diplomatic mission except with express consent.

Classes and Precedence among Heads of Mission

7.25 The titles and precedence of heads of mission were topics of great importance in earlier centuries. The reasons were that the choice of title agreed between two States reflected the political importance of the States as well as the diplomatic relations between them and also that the title of the envoy as well as his precedence within that class determined his right of access to the receiving sovereign and therefore his power to influence or to protest. Since 1945 with the growing acceptance, at least in theory, of the sovereign equality of all States as expressed in the Charter of the United Nations, the distinctions between envoys of different rank have largely disappeared and almost all heads of mission are now ambassadors (or have titles of equivalent rank such as high commissioner in the case of

[12] See in particular the 1985 UK Government Review of the Vienna Convention on Diplomatic Relations, Cmnd. 9497, at paras 28–32.

Commonwealth States or nuncio in the case of the Holy See). Precedence retains some importance in protocol and ceremonial contexts but it no longer determines the level of reception of an envoy or the weight accorded to his representations.

7.26 The question of classes of envoy and precedence among them was in fact the first area of diplomatic law to be codified—in the Regulation of Vienna signed in 1815 by what were then the greatest Powers – Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden.[13] At this period only monarchies and republics of equivalent political standing exchanged ambassadors and there was a proliferation of lesser titles for heads of diplomatic missions, such as ministers, envoys, agents, residents, chargés d'affaires. Even at the time of the death of Queen Victoria in 1901, Britain sent ambassadors to only eight capitals—Vienna, Paris, St Petersburg, Constantinople, Berlin, Rome, Madrid, and (from 1893) Washington. The 1815 Vienna Regulation reduced the classes of envoy to three and provided that precedence should be determined by the date of arrival in the receiving State. These rules were accepted in international practice and they are now reflected in Articles 13 to 18 of the Vienna Convention on Diplomatic Relations.

7.27 Article 14 of the Vienna Convention sets out the three classes of heads of mission as:

(a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
(b) that of envoys, ministers and internuncios accredited to Heads of State;
(c) that of chargés d'affaires accredited to Ministers for Foreign Affairs.

The title of nuncio denotes a permanent diplomatic representative of the Holy See. Formerly the Pope sent a nuncio only where his representative was automatically given the status of dean, or doyen, of the diplomatic corps, but since 1994 this is no longer the case. The term 'heads of mission of equivalent rank' indicates a high representative within the French Communauté or a high commissioner within the British Commonwealth. The Pope may also despatch apostolic delegates, but these are not accredited to the head of state or minister of foreign affairs but to the Church and the Catholic population in a specified region.[14] They may be given diplomatic privileges and immunities as a matter of courtesy but they are not strictly heads of mission.

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[13] The text of the Regulation of Vienna is printed in earlier editions of Satow, in the *ILC Yearbook* 1958 vol II, 93–4, or in J A Salmon, *Manuel de droit diplomatique* (Bruylant, 1994) para 135.

[14] H E Cardinale, *The Holy See and the International Order* (Smythe, 1976) 136–50; J-C Noonan Jr, *The Church Visible: the Ceremonial Life and Protocol of the Roman Catholic Church* (Viking, 1996) 92–3.

7.28 In the years following the adoption of the Vienna Convention, appointment of heads of mission other than ambassadors became very rare and usually resulted from some historical anomaly or coolness in relations. In 1972 the United Kingdom and China, in the context of a wider political settlement, agreed to upgrade their representation from chargés d'affaires to ambassadors and in 1996 the UK and Albania also upgraded their level of representation from that of chargés d'affaires to ambassadors. The last UK Legation, sent to the Holy See, was in 1982 replaced by an embassy.

7.29 Precedence among heads of diplomatic missions is now determined by the date of their taking up their functions. The taking up of their functions may—in accordance with the practice in the receiving State—be determined either by the date of presentation of credentials or by notification of arrival accompanied by presentation of a true copy of the ambassador's credentials to the ministry of foreign affairs of the receiving State. The order of formal presentation of credentials must now be determined by the date and time of the arrival of the ambassador—so that if a receiving State determines the taking up of functions by reference to presentation of credentials it is not permitted to manipulate the date of this ceremony so as to alter precedence. Seniority in post thus determines precedence and the holding of the office of dean of the diplomatic corps. In Washington in April 2008 the position of dean of the diplomatic corps was held by the ambassador of Djibouti who had been in his post for 20 years.

7.30 The precedence of members of the diplomatic staff of each embassy is determined by the sending State and must be notified to the ministry of foreign affairs of the receiving State.

Chargés d'Affaires

7.31 A distinction must be drawn between chargés d'affaires accredited to ministers of foreign affairs, already mentioned as forming the third class of heads of mission under Article 14 of the Vienna Convention on Diplomatic Relations, and chargés d'affaires *ad interim* who are appointed to act provisionally as head of a mission. The former were sometimes known as chargés d'affaires *en pied* or as chargés d'affaires *en titre* and, as indicated above, they have almost vanished from diplomatic practice as the appointment of ambassadors has become entirely general. An exceptional example of this generally obsolete practice however took place in the Federal Republic of Yugoslavia in 1992 where as a sign of displeasure at that State's role in the break-up of Yugoslavia, many States withdrew their ambassadors from Belgrade and replaced them with chargés d'affaires *en titre*.

7.32 Chargés d'affaires *ad interim*, who are not formally accredited either to heads of State or to ministers of foreign affaires, are by contrast frequent appointments. Article 19 of the Vienna Convention specifies that they should be appointed when the post of head of mission is vacant or the head is unable to perform his functions. It is usual diplomatic practice for an ambassador to take his leave and for there to be a gap before the arrival of his successor during which a chargé d'affaires *ad interim* will act as head of mission, and a chargé may also be appointed when the ambassador is recalled home for consultations or is abroad on leave, seriously ill, or even held hostage. When in 1971 the British ambassador to Uruguay was kidnapped by the Tupamaros guerrillas, however, the UK government declined for presentational reasons to appoint a chargé d'affaires *ad interim.*[15]

7.33 The appointment of a chargé d'affaires *ad interim* must be notified to the ministry of foreign affairs—usually by the departing head of mission but, if he is unable to do so, by the ministry of foreign affairs of the sending State. The post may be held only by a member of the diplomatic staff. If no member of the diplomatic staff is present in the receiving State, the Vienna Convention permits a member of the administrative and technical staff, with the consent of the receiving State, to be in charge of the administrative affairs of the mission (for example securing the embassy premises, property, and archives). Such an individual would however not perform diplomatic functions or be entitled to diplomatic privileges or immunities.

[15] G Jackson, *People's Prison* (Faber & Faber, 1973).

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Book III

DIPLOMATIC PRIVILEGES AND IMMUNITIES

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8

PRIVILEGES AND IMMUNITIES OF DIPLOMATIC MISSIONS

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Justification for Diplomatic Privileges and Immunities

8.1 The most fundamental rules of diplomatic law—that the person of the ambassador is inviolable and that a special protection must be given to the messages which he sends and receives from his sovereign—have been observed from time immemorial among civilized States. During the sixteenth and seventeenth centuries, when the exchange of permanent ambassadors between the States of Europe gradually became general, it came to be accepted in state practice and by the writers on international law that even where there was evidence that an ambassador had engaged in conspiracy or treason against the receiving sovereign, he was immune from the criminal jurisdiction of the receiving State. He could be expelled, but he could not be detained or tried. Immunity of the ambassador from the civil jurisdiction of the receiving State was established during the seventeenth century. Then, as much as now, it was thought necessary for an ambassador to uphold the prestige of his sovereign by magnificent display. But the sending State did not ordinarily provide allowances for this, and so the ambassador who lacked great private means would often find himself obliged either to go into business or to fall into debt. Several governments found that embarrassing incidents, and the growing independence of the courts, made it necessary to enact national laws expressly providing for diplomats to enjoy immunity from civil suits and from execution against their property.

8.2 The broad outlines of customary international law regarding the privileges and immunities of diplomats, their property, premises, and communications were established by the middle of the eighteenth century, and were excellently described by Vattel in *Le Droit des Gens.* Vattel clearly explained why the nature of the ambassador's function made these immunities necessary. The law of nations—now known as public international law—required States which accepted foreign envoys to guarantee rights necessary to enable them to exercise their functions including independence from local jurisdiction. It was important that ambassadors should not be afraid of traps or distracted by legal trickery.[1] Montesquieu also emphasized the need for the ambassador to be independent of the receiving sovereign.

> Le droit des gens a voulu que les princes s'envoyassent des ambassadeurs, et la raison, tirée de la nature de la chose, n'a pas permis que ces ambassadeurs dépendissent du souverain chez qui ils sont envoyés, ni de ses tribunaux. Ils sont la parole du prince qui les envoie, et cette parole doit être libre.[2]

8.3 Modern practice and theory have adopted this explanation of 'functional need' as the correct explanation of and justification for diplomatic privileges and immunities. The ambassador's status is thus distinct from that of the ordinary alien who enjoys no immunity from jurisdiction because he does not represent his State. Grotius remarked that ambassadors were, by legal fiction, deemed to be outside the territory of the State where they were residing;[3] but when this fiction came to be popularly misunderstood as meaning that embassies were small enclaves of foreign soil, it was seen to be misleading and dangerous. The term 'exterritoriality', or 'extraterritoriality', is sometimes used to denote the totality of privileges and immunities accorded to diplomatic agents, their families, and subordinate staff, or to describe the status of embassy premises. But it is now everywhere accepted that it does not mean that the diplomat is not legally present in the receiving State or that the embassy is deemed to be foreign territory. Marriages, or crimes, occurring on diplomatic mission premises, are regarded in law as taking place in the territory of the receiving State.

8.4 Diplomatic privileges and immunities are therefore founded on the customary practice of many centuries. They enable ambassadors and their staffs to act independently of any local pressures in negotiation, to listen and speak on behalf of a foreign State while being themselves under protection from attack or harassment, to speak freely to their own governments, and they are thus essential to the conduct of relations between independent sovereign States. They are given on a basis

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1 *Le Droit des Gens,* IV. VII, Sect 92.
2 *De l'Esprit des Lois,* xxvi, Ch 21.
3 *De Jure Belli ac Pacis,* II. XVIII. iv. 5.

of reciprocity, which has proved a most effective guarantee of observance of the rules. Every State is both a sending and a receiving State. Any government which fails to accord privileges or immunities to a diplomat within its territory knows that it risks not only collective protest by the *corps diplomatique* in its own capital but also reprisals for its violation by the injured sending State against its own diplomats.[4]

8.5 Although the broad rules regarding the privileges and immunities of ambassadors and the staff of their missions continued unchanged from the eighteenth century, there grew up on matters of detail considerable variation in the practice of individual States. Some States admitted exceptions to the rule of immunity from civil jurisdiction in regard, for instance, to real property, or where the action related to the diplomat's commercial activities, while others, in particular the United Kingdom and the United States, admitted no exceptions. Some States refused to accept their own nationals as diplomatic representatives of another State, others accepted them provided that they enjoyed no privileges or immunities, others again allowed them privileges and immunities. Some States gave full privileges and immunities to all members of the ambassador's staff—known as his suite—from senior diplomats such as counsellors and first secretaries down to chauffeurs and cleaners; others accorded immunity to clerks and typists in regard to official acts only and no privileges or immunities to domestic servants; while most drew the line at intermediate points. The twentieth century led to new forms of diplomatic communication, such as wireless transmitters in missions and carriage of diplomatic bags by ad hoc couriers, or by hand of the pilot of an aircraft, and no clear agreement emerged as to whether these new methods were permissible or entitled to equal protection with the traditional diplomatic bag. There was a series of codifications of the rules of diplomatic law, of which the two most important were the Havana Convention on Diplomatic Officers, signed in 1928,[5] and the Harvard Research Draft Convention on Diplomatic Privileges and Immunities, published in 1932.[6] But only 14 Latin American States became parties to the Havana Convention, and the Convention described itself as an interim instrument 'until a more complete regulation of the rights and duties of diplomatic officers can be formulated'. The Harvard Draft had great persuasive authority, but it did not lead States to modify the provisions of their domestic law where these diverged.

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4 Hurst, 'Les immunités diplomatiques' (1926), 2 *HR* 123.

5 *UN Legislative Series,* Vol 7, 419.

6 (1932) 26 *AJIL* Supplement, 19. For evaluation of its long-term significance see E Denza 'Diplomatic Privileges and Immunities' in Grant and Barker (eds) *Harvard Research in International Law: Contemporary Analysis and Appraisal* (Hein, 2007).

8.6 The successful conclusion in 1961 of the Vienna Convention on Diplomatic Relations, to which by 2008 there were 185 States Parties, placed the law on diplomatic privileges and immunities on a clear legal basis which is now virtually universal. The text of the Convention was carefully prepared for several years by the International Law Commission of the United Nations,[7] who took account of the comments of governments on successive drafts, and it was submitted to a Conference to which all members of the United Nations, members of the Specialized Agencies, and parties to the Statute of the International Court of Justice had been invited. The Convention therefore from the outset carried great authority as a codification of those areas of diplomatic law where the customary rule was clear, or the weight of state practice could be ascertained by research. Equally important, the text took careful account of the sometimes conflicting interests of governments on those few but important issues where, in the interests of progressive development of the law, it was necessary to negotiate a compromise solution. The overwhelming acceptance of the Convention by the international community as a whole as well as the limited number and importance of reservations made to it by parties is clear testimony to the soundness of its provisions. Even where one State involved in a dispute over privileges or immunities was not a party to the Convention it soon became practice for the matter to be argued entirely on the basis that the text of the Convention reflected the applicable law. And although the increasing risks to diplomats abroad from terrorist violence, kidnapping, and attacks on embassy premises have made the protection given by the Convention even more necessary than when it was drawn up, the instances of breach of its provisions by governments themselves have been very rare. In short, the Vienna Convention constitutes modern international law in regard to the privileges and immunities of diplomats.

8.7 The Convention clearly justifies privileges and immunities by reference to functional need. The Preamble sets out '. . . that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States'. The result of this approach was that a greater degree of protection than under customary law was given to the mission itself—to its premises and to its communications in particular—whereas for diplomatic agents and for the subordinate staff of the mission privileges and immunities were generally restricted below what had been accorded under customary law or national practice. This restrictive approach to individual privileges and immunities relates particularly to matters outside diplomatic

[7] For a summary of the debates and successive drafts of the International Law Commission see *ILC Yearbook,* 1957 and 1958.

functions, such as commercial activities or the private ownership of real property within the receiving State.

Following the arrangement of the text of the Vienna Convention, diplomatic privileges and immunities will be described in this chapter and the following three chapters under the following headings: the status of the mission itself as regards its premises, archives, and communications; the privileges and immunities of diplomatic agents; the position of families and junior staff and of nationals and permanent residents of the receiving State; and the obligations of third States. **8.8**

The Premises of the Mission

The inviolability of the ambassador's residence—which was normally also his place of work and the residence of members of his suite—was generally established in customary international law by the eighteenth century. Before then the extent of protection and immunity from law enforcement accorded to diplomatic residences varied from capital to capital. In a few places, notably Venice, Rome, and Madrid, there was established a custom known as *franchise du quartier.* The embassies which enjoyed this extended form of exterritoriality claimed the right to prevent the arrest of persons in the vicinity and exemption from tax on supplies brought in nominally for their use. In consequence the embassies became sanctuaries for law-breakers. Ultimately there was a backlash against this abuse of immunity, and the custom of *franchise du quartier* disappeared in Europe by the eighteenth century. However, somewhat similar rights of extended exterritoriality were secured under nineteenth century treaties between Britain and France on the one hand and some of the States, particularly in the Far East, which came under their protection or influence. For example in China, after the Boxer Rising in 1899, during which foreign missions in Peking were under siege, Article 7 of the Final Protocol between China and the foreign Powers, under which friendly relations were re-established, provided for special rights for foreign missions to exclude Chinese residents and to police and defend themselves.[8] Special rights of exterritoriality were everywhere terminated by the end of the Second World War. **8.9**

In Britain on the other hand, the inviolability of the ambassador's residence was clearly established only during the nineteenth century. No reference to it was made in the Diplomatic Privileges Act, 1708,[9] whose provisions established the framework of British practice in regard to diplomatic immunities. In 1827 the coachman of Mr Gallatin, United States Minister (Head of Mission) in London, **8.10**

[8] UK Treaty Series No 17 (1902).
[9] 10 Anne c 12.

was arrested in the stable of the Legation and charged with assault. The British government upheld the action taken, but Mr Gallatin, who had in the meantime dismissed the servant, dissented from the views expressed. As the outcome of this case, steps were taken by the British government to ensure that no similar arrest of the servant of a foreign minister should in future take place without a previous communication being made to the minister, in order that his convenience might be consulted as to the method of putting the warrant into execution.[10] In 1896 Sun Yat-Sen, a Chinese national, and then a political refugee, was detained as a prisoner in the Chinese legation in London, with the apparent intention of transporting him to China. His friends were alerted through a note which he threw from his window and they applied to the court for the issue of a writ of habeas corpus (requiring production of the prisoner and justification for his detention). The court however declined,[11] doubting the propriety of such action where a foreign legation was concerned, and considering the matter rather one for diplomatic proceedings. The Chinese minister was thereupon formally requested by the British government to release the man, whose detention was contrary to law, and an abuse of diplomatic privilege. He was released on the following day and went on to become President of the Republic of China.

8.11 Article 22 of the Vienna Convention on Diplomatic Relations lays down that '[t]he premises of the mission shall be inviolable'. The term 'inviolability' has two distinct aspects in modern international law. The first is immunity from any legal process or any action by the law enforcement officers of the receiving State. This is spelt out in paragraphs 1 and 3 of Article 22. Without the consent of the head of mission, the premises may not be entered by the police, by process servers, by building safety or health inspectors—even by the fire brigade if the premises are on fire. The clear exclusion of an exception in case of emergency on the premises of the mission was seen to be justified when a fire in the United States embassy in Moscow was tackled by 'fire-fighters' who were in fact KGB agents more interested in taking secret documents than in extinguishing the flames. No right of entry is given to the receiving State, even where it believes that inviolability is being abused and the premises used in a manner 'incompatible with the functions of the mission' (which is prohibited under Article 41). But on one occasion the Pakistan government told the ambassador of Iraq that it had evidence that arms imported under diplomatic cover into Pakistan and intended for rebel tribes in Baluchistan were being stored in the embassy of Iraq, and asked permission to search the premises. The Ambassador refused, but the police were authorized to carry out a search in his presence and large quantities of arms were found to be

[10] A McNair, *International Law Opinions* (1956) Vol 1, 193.
[11] *Mew's Digest of English Law Cases,* Vol 2, 306; McNair (1956) Vol 1, 85.

stored in crates. The Pakistan government protested strongly to the government of Iraq, declared the Ambassador *persona non grata* and recalled their own ambassador.[12] Entry in such circumstances of threat to national security can only be justified, if at all, as a measure of self-defence.

8.12 In London in 1984, during a demonstration by Libyan dissidents outside the Libyan diplomatic mission (which they styled the Libyan People's Bureau) a policewoman on duty protecting the mission was fatally shot by a gunman within the building. The Libyan government of Colonel Gaddafi refused permission for police to enter and search the building for the murder weapon and the murder suspect. The British government upheld the inviolability of the premises, but in the face of continued refusal to cooperate by the Libyan authorities they broke diplomatic relations with Libya and all those within the mission were required to leave the United Kingdom. The House of Commons Foreign Affairs Committee later carried out an enquiry into these events and concluded that under circumstances in which there was no continuing threat from the mission to the public, the authorities would not have been justified on grounds of self-defence in forcibly entering the premises of the mission.[13] In 1989 the United States carried out an armed intervention in Panama in order to seize General Noriega who was acting as head of state of Panama though not recognized as such by the US. He took refuge in the mission of the Holy See to Panama and US troops did not infringe the inviolability of its diplomatic premises—though their search of the residence of the ambassador of Nicaragua which formed part of the embassy of Nicaragua would, but for a US veto, have been condemned by a Security Council resolution.[14]

8.13 Even for a bona fide public purpose, such as the widening of a road, the receiving State has no power to expropriate any part of the premises of the mission. Thus, when the British authorities wished to construct a new underground railway line running underneath the premises of several embassies, the general compulsory powers of acquisition were not used and the express consent of each embassy to the tunnelling underneath its building was sought and granted. The immunity from legal process is extended by Article 22.3 of the Vienna Convention to property on mission premises and to the means of transport of the mission. Embassy cars are protected from 'search, requisition, attachment or execution', but it is accepted in many major capitals that a car which is causing serious obstruction and whose driver cannot be traced may be towed away provided that no charges

[12] *The Observer,* 11 February 1973.

[13] House of Commons Foreign Affairs Committee 1st Report, 1984–5 paras 88–95; UK Government Review of the Vienna Convention, Cmnd 9497 para 83.

[14] (1990) *RGDIP* 495, 803; *The Times*, 28 and 30 December 1989.

or fines in respect of the incident are imposed on those involved. Embassy bank accounts to fund diplomatic operations in the receiving State are not held on mission premises so that they are not directly covered by the terms of Article 22, but a series of cases in national courts has established that such accounts cannot be made subject to attachment or execution on the basis that they serve sovereign purposes of a foreign State.[15] The embassy account is treated in this context as a whole even if the funds in the account are used for commercial purposes (such as payment for supplies of goods or services) as well as for strictly governmental purposes. These cases have clearly established a rule of customary international law. The rule has been explicitly confirmed in Article 21 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property,[16] which provides that 'property, including any bank account, which is in use or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences' is not to be considered as coming within the general exemption to immunity for state property used or intended for use for commercial purposes.

8.14 The second aspect of the inviolability of embassy premises is the duty of protection laid on the receiving State. Under Article 22.2 of the Vienna Convention '[t]he receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity'. 'Appropriate' steps imply that the extent of protection provided must be proportionate to the risk or threat to the premises. Clearly the receiving State cannot be expected to station police permanently outside every embassy building; and all residences of diplomatic and of administrative and technical staff are equally entitled to the protection implied by inviolability. But if the authorities know of an impending hostile demonstration, or if the ambassador informs them of an intrusion or an impending attack, then they are obliged to provide protection proportionate to the threat or to remove the intruders on request.

8.15 Attacks on or threats to embassies do not as a general rule involve breach of its duties by the receiving State when they are instigated by terrorists or dissidents seeking payment or political concessions for the release of diplomatic hostages. They do however give rise to special difficulties for the authorities of the receiving State who may be unable to secure the consent of the head of the mission to any

[15] See in particular *Philippine Embassy Bank Account Case*, 65 ILR 146; *Alcom v Republic of Colombia*, [1984] AC 580; 74 ILR 170; *Liberian Eastern Timber Corporation v The Government of Liberia*, 89 ILR 360.

[16] UN Doc A/RES/59/38.

operation to end the siege if the ambassador is himself held hostage. In 1980 the Iranian embassy in London was occupied by commandos hostile to the Islamic regime in Tehran and diplomats were held hostage. The British government secured the consent of the government of Iran as well as that of the most senior Iranian diplomat not held within before authorizing the Special Air Service to carry out a relief operation which led to the rescue of all surviving hostages and the death of all but one of the terrorists.[17] The hostage-takers holding the embassy may also make political or financial demands on the government of the receiving State. Evidence from a number of embassy sieges shows that capitulation to these unlawful demands leads only to further sieges and escalation of demands, but the sending State may sometimes refuse to authorize forcible rescue. In December 1996 guerrillas from the Tupac Amaru Revolutionary Movement seized the residence of the Japanese ambassador to Peru, making extensive demands for money, release of prisoners, rejection of foreign investment, and safe conduct to the Amazon jungle. After four months the Peruvian government ended the siege through trickery and force without securing the consent of the government of Japan—which however expressed understanding after the rescue operation was successfully completed.[18]

8.16 A single but notorious incident for which the receiving State was responsible was the seizure in November 1979 of the United States embassy in Iran—originally effected by militant 'students' but condoned over the subsequent 15 months by the government of Iran who failed entirely to take any 'appropriate steps' either to prevent it or to bring it to an end. The US took proceedings against Iran before the International Court of Justice, and the International Court first ordered the release of the hostages as an interim measure and in its final judgment in the *Hostages Case* condemned Iran for repeated and multiple breaches of the Vienna Convention on Diplomatic Relations. The government of Iran made no serious attempt to justify these breaches before the International Court and sanctions were imposed against Iran by Member States of the European Communities and by other States as well as by the US.[19]

8.17 It is not obligatory, nor is it universal practice, for national law to provide especially severe penalties for attack or trespass on embassy premises, or to make mere insult to the premises or the flag of the embassy a criminal offence. But provisions of this kind have been very common. For example legislation in the United States

17 1980 *RGDIP* 1134.

18 *The Times*, 20 and 21 December 1996; 23 and 24 April 1997; 2 and 14 May 1997; *Japan Times,* 23 April 1997; E Denza, *Diplomatic Law* (3rd edn, 2008) 162–3.

19 *Case concerning United States Diplomatic and Consular Staff in Tehran*, 1980 ICJ Reports 3; Barker, *The Protection of Diplomatic Personnel* (Ashgate, 2006) 8–9 and ch 4.

makes it an offence to display a flag or placard intended to intimidate or ridicule foreign diplomatic representatives, to interfere with performance of diplomatic duties within 500 feet of embassy premises except under a police permit, or even to congregate within that area and refuse to disperse on police orders.[20] Political demonstrations outside foreign embassies are however now a fashionable form of protest at the policies of the sending State—or sometimes against the policies of the receiving State. In democratic countries with constitutional guarantees of freedom of speech and assembly or party to human rights treaties, the police and government authorities and sometimes the national courts must try to balance the rights of the demonstrators to protest with the rights of the embassy to carry out its functions and to have its inviolability and also its dignity protected. The US Supreme Court held in 1988 in the case of *Boos v Barry* that under Article 22 of the Vienna Convention 'the prohibited quantum of disturbance is determined by whether normal embassy activities have been or are about to be disrupted'.[21]

8.18 The duty of protection in Article 22 does not make it a matter of legal obligation to pay compensation in respect of any damage that may be inflicted on embassy premises by terrorists or by protesters in the absence of failure on the part of the receiving State to accord the appropriate protection. But both before and after the Vienna Convention (when attacks on mission premises have become more frequent in many parts of the world) British practice has been to pay on an *ex gratia* basis all claims for damage to inviolable premises in London, while claiming reciprocally for all damage deliberately inflicted on British missions and diplomatic residences abroad. Many other countries follow this practice and, generally speaking, there has been little difficulty in arriving at satisfactory settlements of these claims. One instance where payment was made for damage which did not result from any deliberate attack on mission premises related to the damage to the Nigerian High Commission in London resulting from a car bomb explosion in March 1973. This attack by the Irish Republican Army was directed against the British authorities and not against the Nigerian High Commission and there was no suggestion of any failure on the part of the police to take appropriate steps to protect the mission. But the British government met the full cost of the damage. The siege of the Iranian embassy in London described in paragraph **8**.15 above resulted in the total destruction by fire of the building, and the United Kingdom government at other times suffered extensive damage to its embassy in Tehran—these claims and counter-claims were finally settled by

[20] *UN Legislative Series,* Vol 7, 375; (1938) 32 *AJIL* 344 and Supplement, 100. *Frend et al v US, Annual Digest* (1938–40), No 161.

[21] 485 US 312; 121 ILR 499 at 551. For other national cases on demonstrations outside embassies see E Denza, *Diplomatic Law* (3rd edn, 2008) 169–175.

an Exchange of Notes between the two governments in 1988.[22] Notwithstanding this widespread practice of paying compensation on an *ex gratia* basis, the modern tendency among those States more vulnerable to terrorist or politically motivated damage is to increase the level of their physical protection, perhaps to employ private security firms for this purpose, and also to take out insurance. But the extent of physical security may in some cases where the terrorist threat, particularly from Al Qaeda, is extreme turn the embassy into a fortress cut off from the surrounding city and prevent the mission from carrying out its functions effectively.

8.19 The premises of the mission are defined in Article 1 of the Convention as 'the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission'. Neither the sending nor the receiving State has a right unilaterally to identify specific buildings as embassy premises. They have to reach agreement in borderline cases such as cultural institutes under the direction of a cultural attaché, tourist offices, embassy reading rooms, or information offices open to the public. But in practice most problems usually arise in determining the time when the status of premises of the mission begins and ends. The Vienna Convention has clear provisions regarding commencement and termination of personal privileges and immunities, but not in regard to mission buildings. It is settled that ownership of property by a sending State, perhaps with a remote intention to use it for diplomatic purposes, is not enough to make these premises inviolable.[23] But if the sending State has notified the receiving State of its acquisition of premises for use as an ambassador's residence or embassy offices, and has secured any consents which may be needed under local law (for the character of a building as embassy premises does not exempt it from local building or planning laws), then those premises are generally regarded as premises of the mission while they are being prepared for occupation and use. In the opposite case, where a diplomatic mission has vacated buildings, they continue to enjoy inviolability for a 'reasonable period' of a few months, just as the diplomat is entitled to privileges and immunities for a reasonable period after his appointment ends. When the United Kingdom broke diplomatic relations with Libya in 1984 following the shooting from the mission premises described above, the premises were treated as inviolable for a further seven days before police entered to search for evidence related to the killing. (The 'reasonable period' was very short in this case

[22] Exchange of Notes concerning the Settlement of Mutual Claims in respect of damage incurred to the Diplomatic Premises of the United Kingdom in Iran and the Islamic Republic of Iran in London, 6 July 1988, Cm 480.

[23] *Tietz et al v People's Republic of Bulgaria, Weinmann v Republic of Latvia, Bennett and Ball v People's Republic of Hungary, Cassirer and Geheeb v Japan,* 28 ILR 369, 385, 392, 396.

because of the conduct which had led to the mission being vacated.) After diplomatic relations have been broken off or a mission has been recalled, the receiving State will still be obliged under Article 45 of the Vienna Convention to 'respect and protect' the premises of the discontinued mission, along with the property and archives in them.

8.20 National laws or regulations may prescribe that consent of the receiving State is required before particular premises are accepted as 'premises of the mission'—provided always that any system requiring notification or consent is not used to prevent a mission from acquiring appropriate premises. Receiving States may for example require embassies to be located in a diplomatic compound or at least in an area suited to diplomatic use in terms of security and traffic or parking control. The United Kingdom under the Diplomatic and Consular Premises Act 1987[24] and the United States under the Foreign Missions Act 1982[25] both require notification of and consent to any proposal to use premises for purposes of a diplomatic mission. Receiving States may be required under Article 21 of the Vienna Convention to assist in the acquisition of suitable premises, and systems of notification before consent to diplomatic use is given are helpful in this context. States on occasion have concluded special international agreements for the mutual provision of suitable embassy sites. The United States for example concluded successive agreements with the Soviet Union and, more recently, with China, and the United Kingdom has also concluded agreements relating to construction of embassy buildings in London and Moscow.

Diplomatic Asylum

8.21 A right to give asylum in diplomatic missions to refugees from the authorities of the receiving State has often been claimed, but it has not always been accepted and there is as yet no universal agreement among States on the circumstances in which the right may be exercised. When the International Law Commission was charged with formulating the rules of diplomatic privileges and immunities, it was agreed that the question of diplomatic asylum should be left aside and it was not expressly considered either in the context of the ILC's work or by the subsequent Conference which negotiated the Vienna Convention on Diplomatic Relations. The Preamble to the Convention provides 'that the rules of customary international law should govern questions not expressly regulated by the provisions of the present Convention'. It is therefore necessary to consider the extent

[24] c 46.
[25] Public Law 97-241, 22 US Code 4301.

to which customary international law admitted a right to give asylum in diplomatic missions. Many of the older cases involved bitter disputes between the States directly concerned and it is difficult to claim that any clear rule emerged from these controversial incidents.

8.22 Among Latin American countries a right of diplomatic asylum has as a matter of local usage been generally accepted, and international agreements were concluded between those countries establishing rules for the exercise of the right. For example in 1889 a convention regarding international criminal law between Argentina, Bolivia, Paraguay, Peru, and Uruguay provided that asylum in a legation should be respected in the case of persons prosecuted for political offences but that the government of the receiving State must be notified and could demand that the refugee should be sent out of its territory as soon as possible but under assurances of safe passage. A Convention on Asylum, drawn up in Havana in 1928 by the Sixth International American Conference,[26] established as between the parties a right to accord asylum to political offenders, persons accused or condemned for ordinary crimes and deserters being expressly excluded. Grant of asylum was limited to urgent cases, there was an obligation to notify the authorities, and the receiving State could require that the refugee be expelled under safe conduct.

8.23 The International Court of Justice carefully considered the nature and scope of the Havana Convention on Diplomatic Asylum in 1950 in the *Asylum Case*[27] and in 1951 in the *Haya de la Torre Case.*[28] In the first of these related cases they observed that

> asylum as practised in Latin America is an institution which, to a very great extent owes its development to extra-legal factors. The good neighbour relations between the republics, the different political interests of the Governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system. Even if the Havana Convention, in particular, represents an indisputable reaction against certain abuses in practice, it in no way tends to limit the practice of asylum as it may arise from agreements between interested Governments inspired by mutual feelings of toleration and goodwill.

The International Court held that neither general international law nor the Havana Convention entitled Colombia—which had extended asylum within its embassy in Lima to Haya de la Torre who was accused of military rebellion against Peru—unilaterally to qualify him as a political refugee. The grant of asylum should be brought to an end—but this did not mean that Colombia was under

[26] M O Hudson *et al*, *International Legislation,* Vol 4, 2412.
[27] 1950 ICJ Reports 266.
[28] 1951 ICJ Reports 71.

a duty to surrender him to the Peruvian authorities. An agreement was eventually reached between the two States under which Haya de la Torre left Peru.

8.24 Under general international law, however, diplomatic asylum is regarded as a matter of humanitarian practice rather than a legal right, and it is accepted that it may now be accorded only for the purpose of saving life or preventing injury in the face of an immediate threat to the refugee. Even then diplomatic asylum should, in the absence of an established local usage, be accorded only on a temporary basis and the fugitive should be surrendered on the basis of a lawful demand by the local authorities unless an agreement for his safe passage out of the country can be secured. It is therefore during war and violent revolution that diplomatic asylum is most commonly extended. In this context the United States and European States which do not accept a general right to grant diplomatic asylum except for essentially humanitarian reasons, have on a number of occasions granted short-term diplomatic asylum to political refugees—for example during the civil war in Chile in 1891, following the suppression of the uprising in Hungary in 1956 and following the fall of the régime of President Allende in Chile in 1973. The political character of the offence alleged is in theory not relevant when temporary asylum is accorded for humanitarian motives but in practice those who benefit from asylum are almost always in danger because of their involvement in political disturbances. Proposals regarding diplomatic asylum were made in 1957 to the International Law Commission[29] but no provisions on the matter were included in the Vienna Convention. Later discussion of the question in 1974 at the request of Australia by the Sixth Committee of the United Nations General Assembly was also inconclusive.[30]

8.25 Although there are no provisions in the Vienna Convention expressly regulating diplomatic asylum two provisions are relevant. First, Article 41.1 requires diplomats and all others enjoying privileges and immunities to respect the laws and regulations of the receiving State—meaning that in the absence of any special custom or entitlement under local law the ambassador has no right to offer asylum indefinitely to anyone whose surrender is lawfully requested by police or other authorities. Secondly, even if asylum is granted without permission or entitlement, the surrender of a refugee may not be enforced by means of entry on to an embassy or other inviolable premises. These two provisions reflect the customary law as set out by the International Court of Justice in the *Haya de la Torre* case mentioned above. The ambassador of a State Party to the European Convention on Human Rights must also be aware that the obligation of his sending State not

[29] *ILC Yearbook* (1957) Vol 1, 54.
[30] See GA resolution 3321 (XXIX).

to surrender a refugee to authorities likely to inflict on him torture or inhuman treatment applies to conduct on overseas embassy or consular premises since these are under the jurisdiction and control of the sending State.[31]

8.26 A distinction may be drawn between the grant of diplomatic asylum to individual refugees and the grant of collective shelter. The latter may be traced to the custom which existed in Persia in former times of taking 'bast' or shelter in a foreign legation as a means of asserting grievances. The principles of hospitality prevailing there precluded the denial of hospitality under these circumstances, whatever inconvenience might be caused. One incident of the kind is recounted in *The Biography of Sir Mortimer Durand,* British Minister at Tehran:[32]

> One day a royal eunuch came galloping into the legation in great haste to see me on most important business. The message was that the Shah's wives had taken umbrage at his decision to marry a girl who was sister of one of his wives. The new favourite was a daughter of a gardener whom the uxorious monarch had seen in one of his many gardens and loved, to the great indignation of her sister, and against Persian custom.
>
> The other wives took up the matter hotly, and issued an ultimatum that if the Shah would not forgo his purpose, they would all leave the Palace, and take *bast* at the legation, which was, they declared, a place of refuge for slaves like themselves, and a sanctuary for the oppressed.
>
> I expressed myself as being highly honoured at this proof of their confidence, and declared that the legation was at the service of the ladies. Upon enquiring the size of the party, I was somewhat staggered to learn that there would be about three hundred in all. I said that the legation would hardly hold so many, but with a sweep of his hand towards the lawn, the eunuch replied that a tent was all that was required, and, as for food, a few sheep and some bread would suffice.
>
> The eunuch then galloped off, and returned two hours later, by which time tents had been pitched on the lawn, sheep had also been purchased, together with the entire contents of a baker's shop. He declared that the arrangements were excellent, that the Shah was furious, and that the ladies were getting into their carriages. He again galloped off, and we awaited the arrival of the refugees with keen interest, when the eunuch reappeared like a whirlwind and shouted out, wild with excitement, "The Shah has yielded, the ladies are getting out of their carriages, and send you their grateful thanks!"

8.27 Collective shelter, or mass asylum, has been used to powerful political effect in recent years. In August 1989, following the new entitlement of East Germans to travel without visas to Czechoslovakia and Poland, hundreds of East Germans

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31 *B v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA 1344.

32 By Brigadier-General Sir P Sykes, at 233.

took refuge in West German embassies in Prague and Warsaw, claiming entitlement to be transported to the Federal Republic of Germany where they would be accepted automatically as citizens. At first the West German authorities tried to stem the inflow, even by temporarily closing their diplomatic missions, and to negotiate safe passage only for refugees already on embassy premises. But when the refugees departed under guarantee of safe passage they were at once replaced with others. It soon became apparent that the East German prohibition on travel to the West could no longer be sustained and within a few weeks the Berlin Wall began to be dismantled.[33] Similar tactics were employed in Albania in 1990 when refugees in foreign embassies refused to leave until granted passports enabling them to leave Albania[34] and again in Beijing in 2002 when some North Korean defectors took refuge in foreign embassies and were ultimately through the good offices of several sympathetic countries taken to South Korea.[35]

Exemption of Mission Premises from Taxation

8.28 Article 23 of the Vienna Convention exempts the sending State and the head of the mission from all taxes in respect of the premises of the mission, with the exception of taxes which 'represent payment for specific services rendered'. It is for each State Party to give a precise interpretation of this exception in terms of its own local taxation system, but the general effect is that the embassy, in addition to being obliged to pay for commodities or utilities actually supplied, where charges are normally levied for these, is expected to pay any tax, or element of a tax, which relates to a supply or a service from which the embassy benefits. For example the embassy would be expected to pay taxes which related to road maintenance and cleaning or street lighting. It would not be obliged to pay rates or taxes which related to national defence, or education, or administration. Under the practice of many States embassies are not expected to pay any element of local taxes or charges which relates to police protection, although they do benefit significantly from police protection, because the obligation to provide such police protection to foreign missions is part of the duty which falls on the receiving State to protect inviolable premises and persons.

8.29 For the exemption to apply, the tax must in law fall on the sending State or on the ambassador. If a private landlord lets his property to a diplomatic mission he cannot claim exemption from rates or taxes which under the local law fall on him.

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33 *The Times*, 20 October and 11 November 1989; 1990 *RGDIP* 123.
34 *The Times*, 6 July 1990.
35 *The Times*, 15 March 2002; 2002 *RGDIP* 650.

Inviolability of Mission Archives

8.30 Article 24 of the Vienna Convention provides that the archives and documents of the mission shall be inviolable at any time and wherever they may be. This means not only that the archives may not be seized or detained for examination by the executive authorities of the receiving State but also that they may not be used as evidence or their production compelled for the purposes of any legal proceedings in that State. In the case of *Rose v The King*[36] a Canadian court held that documents which had been stolen by a defector from the embassy of the Soviet Union were admissible evidence in the trial of a Canadian citizen for espionage—but this decision turned on the absence of any intervention or protest either from the Canadian government which had supplied the documents to the court or from the Soviet Union. The Vienna Convention extended the protection accorded to mission archives in that it was previously regarded as uncertain whether archives were inviolable when they were neither on embassy premises nor in a diplomatic bag. The Convention by contrast protects archives 'wherever they may be', in contrast to other property of the mission which is only inviolable when it is on embassy premises.

8.31 The term 'archives' is not defined in the Vienna Convention, but it is normally understood to cover any form of storage of information or records in words or pictures and to include modern forms of storage such as tapes, sound recordings and films, or computer disks. The Vienna Convention on Consular Relations provides that '"consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe-keeping', and this wider definition would apply by analogy to diplomatic archives, but without being exclusive of other methods of information storage. On the other hand, documents which no longer belong to the mission but have been sent to third parties outside the mission (such as letters to members of the public) are not regarded as being archives.[37] The status of documents held outside the mission premises by professional consultants to an embassy was considered in 2002 by the US House of Representatives Committee on Government Reform in the context of an enquiry it held into abductions of children of dual US and Saudi Arabian nationality but in the event there was no firm guidance on the

[36] 3 DLR (1947) 618, *Annual Digest* (1946) No 76.

[37] According to the judgment of the UK House of Lords in *Shearson Lehman Bros Inc v Maclaine Watdon & Co Ltd and Others (International Tin Council Intervening)* [1988] 1 All ER 116; 77 ILR 145.

question either from the US State Department or through a court ruling.[38] If inviolability for such documents is important (for example in the case of architects' plans for the construction of embassy buildings) it may be better to retain them on mission premises or to mark them specially as mission archives.

Freedom of Communications

8.32 The right of the diplomatic mission to free and secure communication for official purposes is guaranteed by Article 27 of the Vienna Convention. Special protection for its communications is in practical terms probably the most important of all diplomatic privileges and immunities. Without the right to send messages in code and without being able to rely on the inviolability of the diplomatic bag an embassy cannot usefully perform its function of observing and reporting to the sending government, and it will be seriously hampered in the conduct of negotiations on any matter of importance if it cannot receive confidential instructions. But because of the uncertainty of the previous international law on a few points and fear of abuse of wireless transmitters and of the diplomatic bag, Article 27 was one of the most controversial at the Vienna Conference.

8.33 International law had long recognized the right to secure diplomatic communications, although the practice has always fallen somewhat short of the ideal. On the rare occasions where interception was detected and complained of, the State challenged would usually claim that it had not been authorized. If the interception revealed evidence of some conspiracy against the receiving State, that State could claim to be acting exceptionally in defence of its vital interests. Adair recounts the frequent interceptions of despatches authorized by Parliament during the period of the English Civil War, which members of Parliament believed to be justified by the disturbed state of the country. He continues:

> The Portuguese envoy was peculiarly suspect and finally, as he was found to be implicated in negotiations with King Charles when the royal correspondence was captured at Naseby, it was decided to expel him. The ambassador, knowing that any way his fate was sealed, determined to have at least some revenge for the way in which the parliamentary agents had been tampering with his correspondence. He did up in an important looking packet an old news-sheet, a figure of a man hanged and a few pairs of spectacles and, so that the wits of the parliamentary commissioners, not attuned to irony, might miss none of the gibe, he added a note saying that he hoped they would find the spectacles useful in deciphering the valuable information he was sending abroad. No democracy can take a joke against itself, no democratic

[38] The State Department response is in 2002 *Digest of US Practice in International Law* 567.

government dare recognise that it might be a subject for humour: Parliament was furious and ordered his immediate deportation.[39]

8.34 Improvement in methods of cipher, and the development of facilities for transmitting wireless messages made really secure communication possible. But at the Vienna Conference States differed in their approach to diplomatic wireless. Only the richer States could afford to install it and they took the view that the inviolability of the premises where it was installed, together with their right to free diplomatic communication, implied that they were under no obligation to seek the consent of the receiving State before setting it up. If the frequency selected caused difficulty they would cooperate in changing it. The less developed States could not normally afford to install wireless in their missions, and they were afraid that the transmitters over which they had no control could be used for propaganda against them. Eventually they succeeded in including in the Vienna Convention the provision that 'the mission may install and use a wireless transmitter only with the consent of the receiving State'. Under subsequent practice, if a transmitter is installed, it is the responsibility of the sending State to observe international telecommunications regulations. The receiving State, under successive versions of the International Telecommunication Convention, is not responsible. Some States, including the United Kingdom, do not require diplomatic missions to notify or seek permission for installation of a transmitter, while others, including the United States, do confer express authorization and in this context agree with diplomatic missions the frequencies they will use.

8.35 Article 27.1 entitles a diplomatic mission to communicate with its sending government and with other diplomatic and consular missions of the sending State anywhere in the world by 'all appropriate means'. This includes telephone conversation, fax, electronic mail, and other methods which may be devised—and interception of any of these is prohibited regardless of whether the interception involves placing physical equipment such as a bug on mission premises. During the Cold War there were numerous occasions when mission premises of the principal adversaries were discovered to contain covert listening devices—on each occasion the authorities of the receiving State would deny complicity and sometimes even suggest that the bugs had been put in place by the apparent victims. The end of the Cold War might have been expected to lead to a drop in covert surveillance, but recent incidents rather suggest that it is routinely carried out even against allies and against fellow delegations to the United Nations in New York. Katharine Gun, a translator at the UK Government Communications Headquarters, in 2003 leaked evidence of surveillance of home and office

[39] *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries,* 175.

telephones and emails of delegations whose votes would be important in the context of attempts to secure a further Security Council resolution authorizing the use of force against Iraq in 2003. When arrested and charged with breach of the Official Secrets Act she defended her actions on the basis that they exposed illegality on the part of the US government—in regard to the interception of diplomatic communications as well as in regard to the justification for the use of force. The case against her was dropped in 2004 on the ground that the prosecution would be unable to disprove this defence of 'necessity', and ministers not only refused to confirm or deny that bugging had taken place but even to confirm that the premises and communications of the UN Secretary-General and of UN representatives in New York were protected by international agreement from interception.[40]

8.36 The unusual disregard for this rule of diplomatic law is likely to be due to two reasons—first that most violations are not detected because of the sophistication of methods of interception and secondly that the prohibition on interception is not like other rules of diplomacy underpinned by reciprocity, since all States do not have equal technical capacity for interception. States which discover that their communications have been compromised do not resort to the normal remedies of downgrading or breaking relations but rather try to improve their own security defences.

8.37 The official correspondence of a diplomatic mission is under Article 27.2 of the Convention accorded inviolability—but as in practice this inviolability cannot be guaranteed if the letters are sent through the public post rather than through a sealed diplomatic bag, this provision is seldom relied on or publicly invoked.

The Diplomatic Bag

8.38 The diplomatic bag is accorded under the Vienna Convention a more absolute protection than was given under the previous customary law. Before the Convention it was generally accepted that the receiving State had a right to challenge a bag which it reasonably believed contained unauthorized articles. If such a challenge occurred the sending State could elect either to return the bag unopened or to open it in the presence of the authorities of the receiving State. This practice of challenge to a suspect bag is still permitted in the case of a consular bag under the Vienna Convention on Consular Relations.[41] But it is no longer

[40] *The Observer*, 15 and 29 February 2004; *The Guardian*, 26 and 27 February 2004; *The Times*, 27 February 2004.

[41] Article 35.

permitted in the case of a diplomatic bag. The bag may contain only diplomatic documents or articles intended for official use, but the authorities of the receiving State may not demand that it be returned or opened even if they suspect that it is being used to smuggle arms or other illegal exports or imports. States were fully conscious of the dangers of abuse, but they were even more aware that any right of search could be abused by officials claiming to have grounds to suspect any bag which they wished to investigate. The receiving State or the airline authorities may subject a bag to detector devices designed to show the presence of explosives, metal, or drugs, since this does not involve opening or detaining it, and if this test disclosed grounds for suspicion the airlines could decline to carry it. In one incident the customs authorities in Rome realized that a large diplomatic bag destined for Cairo was emitting moans. They seized and opened it and found that it contained a drugged Israeli who had been kidnapped. Some members of the Egyptian embassy were declared *persona non grata* as a result of this discovery.[42]

8.39 In 1984 there occurred in the United Kingdom a similar attempt to bypass extradition procedures when customs officers at Stansted airport became suspicious that two large crates equipped with air holes, originating from the Nigerian High Commission in London and addressed to the Ministry of Foreign Affairs in Lagos, contained a former minister in Nigeria, Umaru Dikko, who had been abducted earlier that day. Because the crates did not have lead or wax seals (the 'visible external marks of their character' required by Article 27.4 of the Vienna Convention) they did not constitute a diplomatic bag but only property or baggage of the mission and could therefore be inspected—upon which the suspicions were confirmed. Dikko, drugged and unconscious, together with a doctor and others involved in the plot, were revealed when the crates were opened.[43] Those diplomats directly involved were declared *persona non grata* and required to leave the UK, while the incident led to close scrutiny by the UK and other governments of the rules protecting the diplomatic bag. Suggestions for systematic recording of the size and weight of bags, for seeking a restrictive amendment to Article 27 to enable challenge to suspect bags, or to negotiate a Protocol setting out general rules for the treatment of bags (on the basis of draft Articles elaborated by the International Law Commission) all however came to nothing.[44]

8.40 Article 27 of the Convention provides that the bag 'may contain only diplomatic documents or articles intended for official use'. It is well established that

[42] *The Times,* 18–20, 23–25, 27 November 1964.

[43] For a vivid account of events, see C R Ashman and P Trescott, *Outrage* (WH Allen, 1986).

[44] See Report of the House of Commons Foreign Affairs Committee, 1984–5 on the Abuse of Diplomatic Privileges and Immunities; UK Government Review of the Vienna Convention. 1985, Cmnd 9497; *ILC Yearbook* 1989, vol II, Part 2; E Denza, *Diplomatic Law* (3rd edn, 2008) 231–48.

suspicions of disregard of this requirement do not give rise to an entitlement to open or search a suspect bag—except perhaps in the event of a manifest threat to human life such as might have been the case had the crate containing Umaru Dikko been labelled and sealed so as to constitute a diplomatic bag. Regulations of a number of diplomatic services however offer some guarantee that the restrictions on use are respected even though they cannot be enforced through inspections on behalf of other States. Because diplomats are also required to respect the laws and regulations of the receiving State, such items as guns (for protection of diplomats and mission premises) and alcohol (for consumption at official receptions) may not be carried in the bag even for official use if this would contravene local law, although there is a good deal of evidence to suggest that this has been regularly ignored by many Western missions in Muslim countries. There are no limits imposed on the size of bags—so that bulky items such as cipher equipment and even building materials for embassy premises—may lawfully be carried in packages forming diplomatic bags.

8.41 Although as stated above diplomatic bags may be subjected to tests not involving opening or detaining it in order to detect unauthorized contents, it is now generally accepted that they may not be electronically screened. Although such screening may not involve opening or detention of the bag, modern screening methods are capable of compromising the security of contents such as cipher equipment and even of reading documents. Their use therefore violates the basic entitlement to free communication which is fundamental to Article 27 of the Convention. On those few occasions where customs authorities—whether on a general or on a particular basis—have claimed entitlement to challenge and screen a diplomatic bag accompanied by a courier, the practice is for the courier to refuse permission and to return with the bag unscreened.

8.42 Article 27 of the Convention does not distinguish between a bag accompanied by a diplomatic courier and an unaccompanied bag—but in practice those States who have the resources do employ professional couriers or couriers ad hoc (usually diplomats or other public officials travelling on some special mission). Even an unaccompanied bag—because of the seals which prevent its being opened without detection—is more secure than a letter sent through the ordinary post. But a bag accompanied by a courier—who will always refuse to be physically parted from his bags on whatever pretext—cannot be screened, detained, or opened without the courier protesting at violation of the rules and its contents can therefore be guaranteed to be secure. Just as the diplomatic bag must be clearly identified as such, usually by official seals in lead or wax and labels indicating the official source and destination of the bag, so the diplomatic courier must carry identifying documents, usually a courier's passport and a document identifying the packages which constitute his bag. This is important because the

courier's own baggage is not exempt from search in the ordinary way. The only privileges or immunities given to the courier are those which are essential to ensure the unimpeded transit of the bag, namely personal inviolability and immunity from arrest and detention. Otherwise he enjoys none of the personal immunity from suit or the tax and customs privileges of a diplomatic agent. In the case of an *ad hoc* courier it is even clearer that his limited inviolability derives from his function as carrier of the bag, since his inviolability ceases as soon as he has delivered the diplomatic bag. The Vienna Convention also authorizes the modern practice of sending a diplomatic bag 'by hand of the pilot' of a commercial aircraft. The captain who carries a diplomatic bag in this way is not regarded as a courier *ad hoc,* but a member of the mission is entitled to access to the aircraft and the captain in order to take charge of the bag directly from him.

Freedom of Movement

8.43 The freedom of all members of a diplomatic mission to travel without restriction within the territory of the receiving State was accepted without question during the eighteenth and nineteenth centuries. Within Europe at least there were until the twentieth century no frontier controls over immigration or transit and no systematic police supervision of the movement of aliens within the territory of any State. It was therefore not necessary for governments to claim or writers of books on diplomatic law to assert any special right for diplomats to move freely within the receiving State. But during the twentieth century the position changed. After the Second World War the Soviet Union issued regulations prohibiting travel by members of diplomatic missions more than thirty kilometres from Moscow without express permission. The other Communist countries in Eastern Europe, and later China, imposed similar restrictions. Many Western countries, including the United States, France, and the United Kingdom, responded by imposing precisely reciprocal limits on travel within their territories by Soviet and Eastern European diplomats, while making clear that these would be withdrawn as soon as the original restrictions were removed.[45]

8.44 Article 26 of the Vienna Convention obliges the receiving State to ensure freedom of movement and travel in its territory for all members of a diplomatic mission. This obligation is '[s]ubject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security'. But it is clear that the intention of the majority of those who drew up this provision

[45] G Perrenoud, 'Les restrictions à la liberté de déplacement des diplomates' (1953) 57 *RGDIP* 444.

was that while the proviso would permit the closing of limited areas of military significance it would not authorize laws and regulations so sweeping in their effect as to undermine the right of free movement for diplomats. Regulations of the kind described above severely limit the effectiveness with which a diplomat can carry out his functions of protection of his fellow-countrymen and observing and reporting on conditions and developments in the receiving State. However, in spite of this the Communist countries throughout the period of the Cold War imposed very serious restrictions on movement, and Western countries rather than explicitly challenging their legality retaliated on a basis of reciprocity. European States however did not impose restrictions against all States which limited the free movement of their own diplomats, and the United States made clear to the Soviet Union in particular that their own preference was to abolish all restrictions on free travel.

8.45 When the Cold War and the extensive controls imposed by Communist States on free movement came to an end, restrictions on travel by diplomats were largely discontinued on both sides. In a few cases this was done by express agreement[46] and in others the systems for control simply withered away. Since the earlier restrictions were enforced through administrative requirements, police surveillance, and the possible sanction of a declaration of *persona non grata*, there was no need for explicit changes to national laws. The right of unrestricted travel for diplomats remains however of practical importance in some States.

[46] See, for example, a Joint Press Release by the UK and Ukraine of 15 September 1992, printed in (1992) *BYIL* 685.

9

PRIVILEGES AND IMMUNITIES OF DIPLOMATIC AGENTS

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9.1 The immunities accorded to a diplomatic agent personally, as distinct from those dealt with in Chapter **8**, which belong to the mission, include personal inviolability and immunity from criminal, civil, and administrative jurisdiction. The distinction between an immunity and a privilege is not easy to define precisely, and the terms have often been used interchangeably, but in general a privilege denotes some substantive exemption from laws and regulations such as those relating to taxation or social security, whereas an immunity does not imply any exemption from substantive law but confers a procedural protection from the enforcement processes in the receiving State. Unless he is entitled to some specific exemption by international agreement or by national law, a diplomatic agent is legally bound by the laws and regulations of the receiving State. He is not exempt from the obligation to obey the local criminal law, or from the duty to pay his debts, or to seek local planning permission before rebuilding his residence, or from local regulations regarding the maintenance and insurance of his vehicle when he drives. But if he breaks any of these laws, his immunity means that he cannot be arrested or detained by the executive authorities of the receiving State

and he cannot be subjected to criminal trial or sued in civil proceedings before the judicial authorities of that State.

Personal Inviolability

9.2 Personal inviolability is, of all the privileges and immunities of missions and diplomats, the oldest established and the most universally recognized. In Europe the inviolability of diplomats can be traced back to the religious protection accorded among the Greeks to the heralds who were the emissaries of the States in war and later to the envoys who undertook peacetime missions.[1] Similar customs can be seen in the earliest history of ancient peoples in India and in China.[2] Clearly the establishment of some rule, whether based on law or on religion, protecting the person of an envoy venturing into strange or hostile territory was an essential preliminary to the conduct of any form of relations between independent peoples. The inviolability of ambassadors is clearly established in the earliest European writings on diplomatic law[3] and from the sixteenth century until the present one can find virtually no instances where a breach of a diplomat's inviolability was authorized or condoned by the government which received him. The seriousness with which an infringement of personal inviolability was viewed by both governments is clearly illustrated by the well-known incident of the arrest of the Russian ambassador in London in 1708, which led directly to the enactment, by way of expiation, of the Diplomatic Privileges Act, 1708 (often known as the Act of Anne).

> In 1708 M. de Mathveof (Matveev) the Russian ambassador, who was about to present his letters of recall, was arrested, with some degree of violence, in the streets of London, at the instigation of certain merchants, to enforce payment of debts. He was shortly afterwards released, on bail being offered by his friends. On hearing of the incident, the Queen commanded the Secretary of State to express regret to the ambassador, who was informed that the offenders would be brought to trial, and punished with the utmost rigour of the law. He was, however, in no way satisfied with this apology, and hurriedly left the country, without presenting his letters of recall, or availing himself of any of the courtesies placed at his disposal. To make amends, Lord Whitworth, the British envoy at St Petersburg, was accredited as special ambassador, for the purpose of conveying to Peter the Great at a public audience the expression of the Queen's regret for the insult offered to his ambassador, and it is recorded that the Czar's carver and cupbearer proceeded to his residence in a court

[1] G Ténékidès, 'Droit international et communautés fédérales dans la Grèce des cités' (1956) II *RdC* 552; C Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911) Vol 1, Ch XIII.

[2] H Chatterjee, *International Law and Inter-State Relations in Ancient India* (London, 1958) 66.

[3] eg Gentili, *De Legationibus Libri Tres* (1585).

> carriage to fetch him to the audience, followed by twenty other coaches conveying court personages and gentlemen of the embassy.[4]

9.3 Personal inviolability of a diplomatic agent is now guaranteed under Article 29 of the Vienna Convention. Like the inviolability of mission premises this has two aspects. There is first the immunity from any action by law enforcement officers of the receiving State: 'He shall not be liable to any form of arrest or detention'. A diplomat who is suspected of an offence may be invited to accompany a police officer to a police station so that his identity and status may be verified, but he cannot be taken there under arrest, detained, or otherwise compelled in any way to attend. The second aspect, which raises more problems of interpretation, is the special duty of protection: 'The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity'.

9.4 The first aspect of inviolability—protection of a diplomat from arrest or detention—has been very generally observed even under extreme circumstances. An extraordinary exception to this pattern was the detention of the diplomatic and consular staff of the United States embassy in Tehran in November 1979 by militant students demanding the extradition to Iran of the former Shah who had been given refuge in the US for the purposes of medical treatment. The government of Iran made no attempt to prevent this attack on the embassy or those within it and subsequently made clear that they approved it, so incurring international responsibility for numerous breaches of inviolability. The United States took proceedings against Iran before the International Court of Justice. The International Court, in an interim Order of 15 December 1979 requiring release of the hostages, emphasized the importance of the rules which had been broken:

> There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose.[5]

The government of Iran however disregarded this Order as well as two resolutions of the UN Security Council, widespread international sanctions, and a final judgment of the International Court,[6] and the hostages were not released until January 1981, under an agreement brokered by Algeria. The condemnation by the International Court and by the international community was however so

[4] C de Martens, *Causes Célèbres du Droit des Gens* (1827) Vol 1, 68.
[5] 1979 ICJ Reports 19. See Barker, *The Protection of Diplomatic Personnel* (2006) 76–87.
[6] *Case concerning United States Diplomatic and Consular Staff in Tehran,* 1980 ICJ Reports 3.

clear that notwithstanding attempts by Iran to justify its conduct by reference to US past and continuing support for the Shah, the prohibition under international law of the detention of diplomats was not weakened.

9.5 Although a diplomat may not be compelled to submit to a breath test or other medical examination, it is practice in some countries including the United States and Canada to invite a suspect diplomatic driver to submit voluntarily to a breath test on grounds of safety. A diplomat who is obviously incapable of driving may on grounds of self-defence or protection of the public be restrained from further driving and alternative arrangements offered for his safe transport. On similar grounds, the Swedish police in 1988 disarmed the Yugoslav ambassador to Sweden who was observed lying under a blanket in a sandpit and brandishing a loaded pistol.[7] A diplomat cannot be compelled to undergo screening or physical search before boarding an aircraft, but in practice diplomats do in general submit to X-ray screening before air travel on a voluntary basis, and it is permissible for an air carrier to deny boarding to any diplomat who refuses screening.

9.6 As to the second aspect of inviolability—the duty of special protection—many States, in fulfilment of their duty to prevent any attack on the person, freedom, or dignity of a diplomatic agent, have created special offences under national law in regard to attacks on diplomats, or required punishment of offences against diplomats with especially severe penalties. This can mean, for example, that press criticism of a foreign ambassador which would not have been criminal if the object of the criticism had been a private individual, constitutes a criminal offence because it attacks an ambassador. The Vienna Convention, however, does not make the creation of special offences or penalties compulsory; nor does the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[8] which does however oblige States Parties to 'make these crimes punishable by appropriate penalties which take into account their grave nature'. 'These crimes' include murder, kidnapping, other violent attacks, and threats and attempts to commit such attacks.[9] Many States, including the United Kingdom, do not have special offences in regard to diplomats, and so although violent attacks are punishable under the ordinary criminal law, and the courts would take into account the fact that they took place against a diplomat, offensive comments and criticisms in the press are usually only punishable if they are obscene or constitute a criminal libel which is seldom the case. But sending States which exercise strict control over their own media will often expect that a receiving State where wide latitude is given in the interests

[7] *The Times*, 17 May 1988.
[8] Article 2. 1035 UNTS 167.
[9] Article 2.

of freedom of expression should censor press material which they find offensive to their diplomats.

9.7 The extent of the duty of the receiving State to protect the dignity of an ambassador was considered in the United Kingdom by the Court of Appeal in 2007 in the case of *Aziz v Aziz and others, Sultan of Brunei intervening.*[10] The Sultan of Brunei, entitled under UK law to the same inviolability as an ambassador, claimed that in order to protect his dignity the court should in publishing a report of legal proceedings brought against a fortune teller by his former wife suppress facts which would lead to his own identification and, he claimed, loss of his dignity. The court however rejected the claim that international law required him to be protected to a greater extent than any other third party to legal proceedings from the consequences of conduct by others which was simply offensive or insulting. As in the case of embassy premises, a balance must be struck by the receiving State between its duty to protect foreign ambassadors and heads of state and its own constitutional guarantee of free speech.

9.8 What 'appropriate steps' the receiving State must take to protect diplomats and other inviolable persons in its territory must be determined in the light of many relevant circumstances by agreement between the sending and the receiving States. The negotiators of the Vienna Convention deliberately added the word 'appropriate' to make clear that there must be limits to the obligations of the receiving State. Major capitals will have several thousand diplomats, together with their families, and members of the administrative and technical staffs of embassies and their families—all entitled to inviolability—and clearly it would be an impossible burden for each of these to have special police protection for person and residence. But where there is evidence of a threat to the safety of a diplomat, such as a likely mob attack or indications that a kidnapping is being planned, the sending State can demand that the receiving State should provide special protection such as an armed guard. States where conditions are unusually dangerous, such as Colombia, may provide armed guards for all ambassadors and their secretaries.[11] A sending State which is well equipped with resources may prefer to provide special protection itself for vulnerable diplomats, and it should do this in agreement with the receiving State. States whose diplomats are particularly vulnerable to kidnapping or attack (such as the United States) provide or organize their own security to an increasing extent even though the primary obligation to protect belongs to the receiving State. Bodyguards provided by the

[10] Judgment of Collins LJ, 11 July 2007 [2007] EWCA Civ 712.
[11] (1982) *AFDI* 1099.

sending State are not of course exempt from the laws of the receiving State regarding the carrying of firearms, or the use of violence.

9.9 It is now settled among parties to the Vienna Convention that the 'appropriate steps' which the receiving State must take to protect personal inviolability do not include surrendering to demands made by hostage-takers when kidnapping of a diplomat has taken place. When the German ambassador to Guatemala, Count von Spreti, was kidnapped in 1970, the government of Guatemala refused to accept the illegal demands made by his kidnappers, and the Count was murdered.[12] The German government accused the Guatemalans of failing in their duty to protect the Ambassador, but the Guatemalan government did not accept that they had in any way fallen short of their legal obligations. It soon became apparent through a series of kidnappings of diplomats, particularly in Latin America, that bargaining with the kidnappers seizing diplomats led merely to inflation of the political and financial demands made as the price for release of the hostages. Western governments took a collective stand in refusing to capitulate to unlawful demands, and the United Kingdom in particular resisted temptation when its ambassador to Uruguay, Sir Geoffrey Jackson, was kidnapped by Tupamaros guerrillas and held captive for eight months.[13] The fact that governments agreed that a diplomat's inviolability did not require a surrender to illegal demands made by kidnappers in exchange for his release probably did as much as the tightening of security measures and the conclusion of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, to dissuade terrorists from regarding diplomats as particularly attractive targets. The incidence of this particular form of hostage taking—though not of other forms of terrorist attacks against diplomats—declined soon afterwards.[14]

Inviolability of Diplomatic Residences and Property

9.10 Until the twentieth century, no distinction was drawn in practice between the 'residence of the ambassador' and the 'premises of the embassy'. When the mission consisted of an ambassador, perhaps one secretary (who under modern practice would be appointed with diplomatic status), the ambassador's family and his suite (whose function was to minister to his personal comforts and enhance his status rather than to perform diplomatic duties), they lived and

12 *The Times,* 7 April 1970; J A Salmon: *Manuel de droit diplomatique* (1994) para 390.

13 Sir Geoffrey Jackson published an account of his captivity in *People's Prison* (1973).

14 For a comprehensive account and analysis, see J C Barker, *The Protection of Diplomatic Personnel* (2006) especially 3–16, 67–70, and 87–96.

worked in a single residence. But as the numbers of diplomatic and other official staff increased beyond the point where they could be accommodated in the ambassador's residence, the practice became for official business to be done in an office building known as the chancery, while the ambassador's private residence is physically separate. The usual practice was for inviolability to be accorded to residences of staff other than the ambassador, but the point was seldom in issue because these residences were not vulnerable to politically motivated attack in the same way as the embassy and so did not normally need special measures of police protection. The Vienna Convention defines 'premises of the mission' so as to include the residence of the ambassador only, but Article 30 provides that the private residence of a diplomatic agent is entitled to the same inviolability and protection.

9.11 Whether premises are in fact the 'residence' of a diplomatic agent may sometimes be a difficult question of fact, for example if they are being prepared for occupation but he has not moved in. In the English case of *Agbor v Metropolitan Police Commissioner*[15] the question in issue was whether the London police, relying on Article 30 of the Vienna Convention, were entitled to evict without a court order a family identified with the side in the Nigerian Civil War opposed to the government, who had taken possession of a flat which was claimed to be the residence of a Nigerian diplomatic agent. The Court of Appeal found as a fact that he had moved out without the intention of returning and that the flat was therefore no longer his residence. The new occupants were in possession, and the court held that even had the premises been the residence of a diplomatic agent, the executive were not entitled to evict them without the authority of a court order. This situation was not thought adequate to enable the government to fulfil its duty of protection and section 9 of the Criminal Law Act 1977[16] made it a criminal offence to trespass on premises which are the residence of a diplomatic agent and gave the police power to arrest offenders. Whether the intruders into diplomatic residences are 'squatters' or political demonstrators the police must however have the consent of the ambassador—or in his absence the consent of the sending State—before they may enter the premises to carry out any eviction.

9.12 Article 30 also gives inviolability to the papers, correspondence, and property of a diplomatic agent. The inviolability of his papers and correspondence is unqualified and implies that they may not be searched or screened. In the event of a threat to members of a mission—as for example in 1972 when letter bombs were

[15] [1969] 1 WLR 703, 2 All ER 707.
[16] c 45.

dispatched to several Israeli diplomats—it is likely that a mission so threatened will give consent to surveillance. In the case of a diplomat's property, inviolability does not apply where there is an exception (as described below) to his immunity from civil jurisdiction, provided that execution can be levied without infringing the inviolability of his person or residence. The United Kingdom authorities interpret this Article as permitting them to tow away an obstructing vehicle belonging to a diplomat under the same conditions as an official embassy car.[17] It is common practice, at least in major capitals, for diplomatic cars to be easily identifiable by police or other traffic authorities by means of special plates.

9.13 The inviolability of a diplomat's property does not mean that he is exempt from the laws and regulations of the receiving State regarding exchange control. He must, in accordance with Article 41 of the Convention, respect these like other laws. But in practice most States apply their regulations to foreign diplomats in such a way that they do not experience practical difficulties. If any State did not do so, it could be argued that it was failing in its duty under Article 25 of the Convention to 'accord full facilities for the performance of the functions of the mission'.

Immunity from Jurisdiction

9.14 If a diplomatic agent commits a crime in the country to which he is accredited, he cannot be tried or punished by the local courts. No case can be cited where, without his consent or that of his government, such a course has been followed. During the sixteenth and seventeenth centuries the writers on diplomatic law often asserted that where an ambassador was detected in a criminal conspiracy or in treason against the receiving State, the receiving State could in self-defence try and punish him. Thus when in 1571 the Bishop of Ross, the representative of Mary Queen of Scots whom Queen Elizabeth of England then held captive, was found to have participated in plots to depose the Queen of England, five learned civilian lawyers were asked for their opinion and held unanimously that an ambassador who incited insurrection against the ruler to whom he was accredited forfeited his privileges and could be tried. But even in this case, where the status of the sending monarch was so doubtful, Elizabeth did no more than imprison Ross for a short time and then expel him.[18] Many other cases of charges of treason against an ambassador can be cited, and in all of them the result was that the

[17] See Chapter **8**, paragraph **8.**13 above.
[18] A McNair, *International Law Opinions,* Vol 1, 186.

ambassador was expelled or (as it would now be put) declared *persona non grata.* The case of Prince de Cellamare was one example.

> In 1718 Prince de Cellamare, Spanish Ambassador in Paris, conspired to deprive the Duc d'Orléans of the Regency and transfer it to his master the King of Spain. The conspiracy was discovered, and Cellamare was placed under arrest. The resident diplomatic body declined to take up the case. Meanwhile in Spain orders had been given for the arrest of the French Ambassador, but he managed to reach the frontier in safety. Cellamare was thereupon conducted to the Spanish frontier and expelled from France.[19]

9.15 The immunity of a diplomatic agent from the criminal jurisdiction of the receiving State is set out, without any exceptions whatever, in Article 31 of the Vienna Convention. The receiving State may, however, take certain actions if it learns of evidence of a criminal offence by a diplomat. A minor offence may be drawn to the attention of the head of mission in the expectation that a reprimand or disciplinary action will be taken by the head of mission. It is customary in London, for example, to bring to the attention of heads of mission and to publicize to Parliament the numbers of parking offences which appear to have been committed by members of the mission and for which proceedings could not be taken. Since their Review of the Vienna Convention in 1985[20] it has been UK government policy to request from their sending States the withdrawal of offenders incurring more than a set number of unpaid parking tickets. The use of the procedure of *persona non grata* for the purpose of controlling abuse of immunity from jurisdiction in regard to parking offences was then without precedent, but was reluctantly accepted by the diplomatic corps and led to a dramatic drop in the number of parking tickets incurred by diplomats and others entitled to immunity. The United States now withhold driving privileges from diplomats regarded as persistent violators of traffic laws and regulations—suspensions are notified to the relevant embassy which is asked to guarantee that the violator will not drive for any period of suspension.[21] In the case of a more serious crime such as a firearms offence, drink driving, or driving without insurance, the receiving State is likely to ask for immunity to be waived so that a trial may take place, and if this request is refused, it is likely that the diplomat will be withdrawn. In 1988, for example, a diplomat in the Vietnamese embassy was required by the UK government to leave London on 24 hours' notice after he was observed brandishing a handgun at a crowd of protesters outside his embassy.[22]

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[19] *Causes Célèbres du Droit des Gens*, 139.

[20] Cmnd 9497.

[21] State Department Circular Notes to Chiefs of Mission in Washington of 2 July 1984, 17 December 1984, and 22 December 1993.

[22] *The Times,* 7 and 8 September 1988.

If the suspect is not withdrawn, the receiving State may declare him *persona non grata* and the sending State will then be obliged to withdraw him. States do not have set rules as to when they will ask for a waiver of immunity or declare an offender *persona non grata,* or when they will withdraw a diplomat against whom serious accusations have been made. It has however become more common in recent years for a waiver of immunity to be granted in respect of drugs charges.

9.16 Immunity from civil jurisdiction was established somewhat later than immunity from criminal jurisdiction, and came under some challenge during the seventeenth century in several European States. The magnificence then expected in the style of life of an ambassador was not supported by allowances from the sending sovereign, and ambassadors were often obliged to incur debts, or to engage in trading to obtain money to pay for the necessary display. Embarrassing incidents led to the enactment of legislation to put the position beyond doubt. Thus in 1679 a decree of the States-General of the Netherlands began:

> Be it known: that every day many troubles and difficulties are caused because the Burghers of this State continue to have the Persons, Servants or goods of Foreign Ambassadors or Ministers coming to this country residing there or passing through it, arrested and detained. . . .[23]

In 1708 the preamble to the Diplomatic Privileges Act in England recited:

> Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his excellency Andrew Artemonovitz Matueof ambassador extraordinary of his Czarish Majesty Emperor of Great Russia her Majesties good friend and ally by arresting him and taking him by violence out of his coach in the publick street and detaining him in custody for several hours . . .'

and the Act went on to provide that

> all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign Prince or state, authorised and received as such by Her Majesty, Her Heirs or Successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void, to all intents, constructions, and purposes whatsoever.[24]

9.17 The immunity from civil and administrative jurisdiction of a diplomatic agent is restated in Article 31 of the Vienna Convention. This immunity is subject to

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[23] *UN Legislative Series,* Vol 7, p 201; C van Bynkershoek, *De Foro Legatorum,* Ch IV.
[24] 7 Anne, c 12.

three important exceptions which were not previously admitted in common law countries but which were established in many civil law countries. The first exception relates to

> a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.

One must look to the civil law to determine what 'real action' means, and this makes clear that a real action is an action where ownership or possession of immovable property is claimed. It is not however clear from the records of the Vienna Conference whether the words 'unless he holds it on behalf of the sending State for the purposes of the mission' merely exclude from the exception the case of the diplomat in whose name the mission premises are placed or whether their scope is wider and they exclude from the exception the private residence of a diplomat, which he can be said to hold 'on behalf of the sending State for the purposes of the mission'. Since the rationale of this exception to immunity is to make possible the trial of actions affecting title to real property—which the diplomat's home State would lack jurisdiction to determine—it may be argued that the exception should be narrowly construed and that it should be possible to bring an action to enable the courts of the State of the forum to determine the legal question of the ownership of a house in which a diplomat is living. Cases in several countries have tended to confirm this interpretation of Article 31.1(a). Any judgment against the diplomat would of course be unenforceable under Article 30 of the Convention so long as he continued to live in the house.

The second exception relates to **9.18**

> an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

It is quite common for diplomats, particularly when exercising consular functions, to be involved in succession matters in an official capacity, since if a national of his own State dies in the receiving State leaving money to other nationals in his home State, the diplomat may become involved in the distribution of the estate. He may also be involved in the estate through claiming on behalf of his government either for taxes owed, or as 'bona vacantia' if there are no heirs either by will or intestacy. In such cases the diplomat enjoys immunity in the ordinary way. His involvement in a private capacity in a succession on the other hand is not part of his functions, and here the interest of the receiving State in asserting jurisdiction over all the parties involved in a succession question is regarded as paramount.

9.19 The third exception to immunity is

> an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

Article 42 of the Convention prohibits a diplomat from exercising in the receiving State for personal profit any professional or commercial activity. But an exception to immunity is still needed as well. A diplomat may disregard the prohibition on professional or commercial activities. The sending and receiving State may agree that the bar should be waived in an exceptional case where the individual is unusually well-qualified for the post, and in such a case the diplomat would not be immune in regard to his business activities. In 1984, for example, when President Reagan appointed Mr William Wilson as ambassador to the Holy See, he was permitted to retain his position in two US commercial companies.[25] The exception is, however, most important in regard to members of the diplomat's family, who enjoy the same immunity from civil jurisdiction but are not obliged to abstain from professional or commercial activities. The fact that immunity from civil jurisdiction does not extend to professional or commercial activities makes it easier for the spouse or child of a diplomat to practise their own profession or to take a job in the receiving State. The receiving State cannot object to this on the grounds that they would be unfairly protected if, for example, he or she could not be sued as a doctor for professional negligence. Some States do discourage members of diplomatic families from taking employment—sometimes in order to reserve scarce employment for their own nationals and sometimes for social reasons. This will be further considered in Chapter **10** below.

9.20 Cases in a number of States have clarified the meaning of this exception from diplomatic immunity. It is clear that it does not cover a single transaction by the diplomat but rather a continuous activity and that it does not cover a contract for goods or services incidental to daily life in the receiving State. In the case of *Tabion v Mufti,*[26] for example, the US Court of Appeals held that a contract of employment between a diplomat and a Philippine national for performance of domestic services was not covered by the exception to immunity. Although a single loan or investment by a diplomat might well be regarded as covered by his general immunity from jurisdiction, a continuous investment of personal assets would be covered by the exception. Diplomatic service regulations of some States prohibit investment by their own diplomats in companies or enterprises in countries where they are posted.

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[25] *International Herald Tribune*, 13 July 1984; (1985) *RGDIP* 141.
[26] 4th Cir. 73 F 3rd 535; 1996 US App. LEXIS 495; 107 ILR 452.

A diplomatic agent is immune from any measures of execution. Even if his government waives his immunity from jurisdiction, the resulting judgment cannot be enforced in the receiving State unless there is a separate waiver. But in the case of the three exceptions to jurisdiction discussed above there is also an exception to immunity from execution. So if an action were brought against a diplomat in respect of a private business activity and judgment obtained against him, the judgment could be enforced so long as the enforcement did not infringe his personal inviolability or that of his residence. His business stocks might be seized, but his house could not be entered. Although this means that the possibilities of enforcing a judgment against a diplomat are limited, a serious view would be taken by the government of the receiving State of a failure to comply with a judgment of a national court, and would be likely to lead to a request to the sending State for his recall. **9.21**

The immunity of a diplomatic agent from civil and administrative jurisdiction covers family proceedings involving divorce or matters of custody and also means that bankruptcy proceedings cannot be instituted against him personally. In the event of a diplomatic agent dying, whether on embassy premises or not, in circumstances which would normally necessitate the holding of a coroner's inquest, it has become established practice, where immunity is claimed by the diplomatic mission, to waive the proceedings. On the suicide of the butler of the British embassy at Madrid in 1921, the Ambassador received the examining magistrate of the district at the embassy, and the evidence given by him and some of the servants was embodied in a *procès-verbal,* which stated that he had waived those rights for the occasion. In February 2009, Jan Winkler, ambassador of the Czech Republic to the UK, died suddenly at his London home, and although a post-mortem examination proved inconclusive as to the cause of death, on the request of his family, and of the governments of the Czech Republic and of the UK, the coroner agreed that no inquest would be held.[27] **9.22**

Exemption from Giving Evidence

A diplomatic agent is not obliged to give evidence as a witness in any legal proceedings in the receiving State. This position was established very much later than the diplomat's immunity from jurisdiction, and the position was still uncertain during the nineteenth century. **9.23**

> In 1856 the Netherlands minister at Washington was requested by the Secretary of State to appear in court to give evidence regarding a homicide committed in

[27] *Hampstead and Highgate Express*, 26 February 2009.

> his presence. By the unanimous advice of his colleagues he refused. Representations were made to the Netherlands Government by that of the United States, which, while admitting that in virtue of international usage and of the law of the United States, the minister had the right of refusal, appealed to the general sense of justice of the Netherlands Government. The latter, however, declined to give the desired instructions, but authorised the minister to give his evidence in writing, and he accordingly offered to do so, adding that he could not submit to cross-examination. The offer was declined, as the district Attorney-General reported that such a written statement would not be receivable as evidence.[28]

The Vienna Convention endorses the position there taken by the Netherlands government. It is made clear that the diplomat is not merely immune from compulsion in regard to the giving of evidence; he is exempt from any legal obligation in the matter. The receiving State would thus not be justified in using his refusal as a reason to declare him *persona non grata* (as happened to the Dutch minister at Washington). Many States take a helpful attitude and are occasionally prepared even to permit a diplomat to give evidence in the normal way. The British government for instance not only waived the immunity of their ambassador in Dublin, Sir Ivor Roberts, in 2002 to allow him to give evidence in the Special Criminal Court against the head of the Real IRA, but also permitted him to be cross-examined. In the alternative, States sometimes authorize their diplomats to make statements on condition that they are not cross-examined, to submit written statements, or to make oral statements on embassy premises. Such evidence was formerly of little use in common law jurisdictions, but written evidence is now admissible in many countries to a greater extent and so statements made under special conditions are increasingly acceptable. A receiving State may however still refuse to admit evidence if it is offered on condition that it may not be subject to cross-examination or not given in open court. In effect any special arrangements must be decided between the sending and the receiving State for each request, and there are no exceptions to the diplomat's absolute freedom from any legal duty in the matter. Many States make clear to their own diplomats that they may not give evidence in local proceedings without express authorization from their own government.

Procedure When Immunity is Raised

9.24 The procedure by which a claim to immunity is asserted varies from country to country. In some States a diplomat may simply inform the ministry of foreign affairs of the proceedings, or a writ served through the ministry of foreign affairs

[28] J B Moore, *Digest of International Law,* Vol 4, 662.

may be returned with the information that the defendant is entitled to immunity. In most cases, of course, proceedings are simply never instituted because the plaintiff is aware of the defendant's entitlement to immunity. In many States it is practice for the executive to guide or direct the courts on the question of immunity. In the United States, for example, provision is made in the Diplomatic Relations Act 1979[29] for the establishment of immunity by motion by the defendant or his government or by 'suggestion' which would come from the State Department. Executive suggestions or certificates issued to US courts may cover applicable law as well as relevant facts and the courts, although they are not legally bound to treat them as conclusive, do not in practice review them.[30] In others, such as the United Kingdom, diplomatic immunity must be decided by the courts as a matter of law. The function of the executive is confined to issuing to the court or to the parties a certificate on relevant matters of fact within the knowledge of the Secretary of State for Foreign Affairs. Thus the Foreign and Commonwealth Office's certificate might state that the Secretary of State had been notified on a certain date of the appointment of the defendant as Second Secretary in the embassy of Utopia, and that he continues to be received in that capacity. The court would under the Diplomatic Privileges Act, 1964[31] be obliged to accept as conclusive these facts which indicate the status of the defendant. But if the plaintiff argued that this action related to a commercial activity of the defendant, or that the defendant was not entitled to immunity because he was a permanent resident of the United Kingdom, the court would decide this issue itself as a question of law.

Waiver of Immunity

9.25 The rules under which the immunity from jurisdiction of diplomats, subordinate staff, and their families may be waived are set out in Article 32 of the Vienna Convention. It is made clear that immunity in substance belongs to the sending State and must therefore be waived by that State. Previous state practice had been conflicting as to whether diplomatic immunity could be waived by the individual concerned, particularly as regards the family and servants of a diplomat. But the usual practice was to ensure that the waiver was made only with the authority of the sending State. The *Waddington* case in Belgium illustrates this approach.

[29] PL 95-393.

[30] See, for example, *Abdulaziz v Metropolitan Dade County and Others*, 11th Cir. 18 September 1984, 740 F 2nd 1328 (1984); 99 ILR 113.

[31] 1964, c 81, s 4.

In 1906, M. C. Waddington, son of the Chilean chargé d'affaires at Brussels, being accused of murder, took refuge in the legation, which was surrounded by police. Later, the chargé d'affaires informed the Public Prosecutor that he renounced immunity from the jurisdiction for his son. The Belgian authorities, however, decided that the consent of the Chilean Government must be awaited, and this having been given, the accused was brought before the Cour d'Assises of Brabant, where, after trial, he was acquitted.[32]

9.26 The fact that the immunity belongs to the sending State does not however preclude that state from delegating authority to waive it. The instructions given to diplomatic service officers of the United States and of the United Kingdom are that immunity from jurisdiction must never be waived without instructions from the home government. But not all States require reference back before waiver is made, and whether reference to the home government is required is a matter for internal regulation and not for international law. The receiving State is therefore not obliged to enquire whether the sending government has in fact been consulted. It is customary for a State to assume that acts or statements made by an ambassador are made with the authority of the sending State. Thus the United Kingdom has provided, in section 2(3) of the Diplomatic Privileges Act 1964,[33] that '[f]or the purpose of Article 32 a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State'.

9.27 The Vienna Convention requires that waiver must always be express. Previously there were many cases in which it was held that where a diplomatic agent simply entered an appearance and contested an action or charge in the ordinary way he must be deemed to have waived his immunity. But a court which is aware of the diplomatic status of the defendant cannot now safely proceed without a waiver in express terms. The requirement that waiver must be express does not, however, imply that it must relate to particular proceedings. The tendency at least in common law countries has been to regard a waiver as valid only if it relates to particular proceedings,[34] and to treat as null and void an undertaking made in advance to submit to the jurisdiction. This means, for example, that where a diplomat finds that a landlord is unwilling to let a house to him because of his diplomatic immunity he cannot get round the problem by agreeing in the lease to waive his immunity in regard to disputes which may arise under the lease. Under the Vienna Convention such undertakings to submit to the jurisdiction would not necessarily be invalid, provided that they were authorized by the sending State, but the safer course is for a waiver to be sought for proceedings about to be

[32] 14 *RGDIP* 159.
[33] c 81.
[34] See *Empson v Smith* [1966] 1 QB 426, [1965] 2 All ER 881, 41 ILR 408.

instituted or already instituted. The modern law on state immunity does make clear provision for advance waiver by a State of its immunity, and such advance waivers are now common in the context of substantial contracts for loans, guarantees, or state contracts. But this rule cannot simply be extended to apply to waiver of diplomatic immunity where different considerations apply.

9.28 If the diplomatic agent himself chooses to bring legal proceedings before the local courts, he is obliged to comply with the rules of the court. He cannot plead immunity in regard to any set-off or counterclaim which may be pleaded by the defendant to his action, provided that it is directly connected with the principal claim which he has brought. If he is successful in his action, and the defendant appeals, he cannot plead immunity in regard to the appeal. The proceedings which he has begun are regarded as a single entity until the matter is finally resolved as to liability. For these reasons, many States require their diplomats to seek their permission before bringing any proceedings in States where they are serving. But execution of a judgment and the carrying out of penalty or sentence following criminal proceedings are regarded as separate from the issue of liability or guilt, and a separate waiver by the sending State is required before they may be carried out.

Commencement and Termination of Immunities

9.29 Article 39.1 of the Vienna Convention lays down that personal privileges and immunities begin when the person entitled enters the receiving State on his way to take up his post. If he is in the territory of the receiving State when he is appointed, his privileges and immunities begin when his appointment is notified to the ministry of foreign affairs. This provision ends the previous uncertainty in state practice as to whether the critical date for the beginning of immunities was the date of notification of appointment, the date of formal presentation of credentials (in the case of a head of mission), or the date of arrival in the territory. If legal proceedings have already been begun when the entitlement to immunity arises, the immunity may be raised as a bar to their continuing (in contrast to the position regarding waiver where proceedings begun on the basis of a waiver cannot be stopped by a withdrawal of the waiver by the sending State). This may occasionally cause difficulty for the receiving State if it is notified of the appointment as a diplomatic agent of a person against whom criminal proceedings are pending, or if it suspects that the appointment may have been engineered in order to obstruct pending civil proceedings. On one occasion where the United Kingdom government was informed of the appointment in a diplomatic capacity of a person against whom serious criminal charges had been laid, they asked the State in question to withdraw the notification, and this was done. If a State

declined to withdraw a notification in such circumstances, the receiving State could of course declare the individual *persona non grata,* but it would also have to argue that the procedure constituted an abuse of diplomatic immunity such that it was not obliged to accord the normal period of immunities which might enable the person to leave the country with impunity.

9.30 The UK Court of Appeal in 1990 in the case of *R v Bagga and others*[35] confirmed the above interpretation of Article 39.1 of the Vienna Convention which had been thrown into doubt by a number of earlier UK cases, particularly in the field of immigration. It is now clear that immunity begins on entry into the receiving State and does not depend on notification to or acceptance by the receiving State except in the case where the member of a diplomatic mission is already in the receiving State when appointed.

9.31 The position regarding termination of immunities on the other hand has long been established—that immunities subsist until the diplomatic agent leaves the country on termination of his mission, or for a reasonable period to enable him to do so.

> In 1859, in the case of the *Magdalena Steam Navigation Company* v. *Martin,* in the English courts, Lord Chief Justice Campbell observed: 'There can be no execution while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall.'[36]

Although the principle of the 'reasonable period' to leave the country is now laid down in Article 39.2 of the Vienna Convention, no guidance is given on what constitutes a 'reasonable period'. A few States have defined in precise terms in their internal law the duration of this 'reasonable period'.[37] Others have preferred to retain a flexible approach which allows their courts or administrative authorities (in the case of privileges) to have regard to the facts of each case. For example an ambassador who was winding up the affairs of the mission as a whole might claim to be entitled to a longer 'reasonable period' than one merely leaving for his next posting. The United Kingdom in general prescribes a period of one month for administrative purposes such as tax exemption, but this could be varied in special circumstances and would not bind the courts if immunity were in issue. Where an appointment is terminated in notorious circumstances—such as when the United Kingdom in 1984 broke diplomatic relations with Libya following the shooting of a policewoman by a gunman within the mission—the receiving

35 [1991] 1 All ER 777, [1990] Imm AR 413.

36 121 ER 36; 2 El & El 94.

37 eg Switzerland (six months maximum), Venezuela (one month minimum): *UN Legislative Series,* Vol 7, 305, 403.

State is likely to allow only a few days for members of the mission to leave the country. Even in such a case, however, the receiving State may extend a longer 'reasonable period' to members of the family of the diplomat expelled on short notice. If a member of a diplomatic mission dies, members of his family are also entitled to a reasonable further period of entitlement to privileges and immunities. Article 39.4 of the Vienna Convention also makes special provision to permit the withdrawal of property of a deceased diplomat or family member and for exemption from succession or inheritance tax on that property.

9.32 The immunity of a diplomatic agent for his official acts—acts performed in the exercise of his functions as a member of the mission—is on the other hand unlimited in time. Immunity in regard to such acts is not a personal immunity of the diplomatic agent but is in reality the immunity of the sending sovereign State. It therefore subsists even when the diplomat's immunity for his personal acts has ended along with his mission. This rule was reaffirmed by the English Court of Appeal in the case of *Zoernsch v Waldock,* where Diplock LJ explained the position as follows:

> In respect of acts done by an envoy in his private capacity the purpose of his immunity from suit or legal process is so that he may perform his duties to his government without harassment while en poste. The immunity is from legal process, not from liability, and its purpose is fulfilled when he has ceased to be en poste and has had a reasonable time to wind up his affairs in the country to which he is accredited. The English cases show that in English law an envoy's immunity from suit and legal process in respect of acts done in his private capacity endures only so long as he is en poste and for a sufficient time thereafter to enable him to wind up his affairs: *Magdalena Steam Navigation Co.* v. *Martin* (23); *Musurus Bey* v. *Gadban* (24). Quite different considerations, however, apply to acts done by him in his official capacity. Such acts are done on behalf of his government. His government being a foreign sovereign government, under principles of English law which are so well known that I refrain from citing authority, is immune from the jurisdiction of the English courts. The propriety of its acts cannot be examined in a municipal court unless it consents to waive its immunity. A foreign sovereign government, apart from personal sovereigns, can act only through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be en poste at the date of the suit.[38]

The actions in this case were clearly official acts performed by Sir Humphrey Waldock as a member of the European Commission of Human Rights and entitled in that capacity to diplomatic immunities. In the German case of *Tabatabai*[39]

[38] [1964] 2 All ER 265–6.
[39] 80 ILR 389.

in 1983, by contrast, the charge was one of possession of opium, and the provincial court of the Federal Republic made clear that such unauthorized possession could not be classed among official diplomatic functions. More controversially, the District Court of Columbia in the case of *Knab v Republic of Georgia*[40] accepted that a diplomat who caused a fatal car crash on his way home from a diplomatic reception had acted in the course of his official duties and was therefore entitled to continuing immunity from civil jurisdiction following a waiver by the government of Georgia of his immunity from criminal jurisdiction and his dismissal from office. This finding was however agreed between the two parties with a view to opening the way to legal action against the sending State which was in effect accepting responsibility for the conduct of its diplomat.

Other Remedies Where Immunity from Civil Jurisdiction Bars a Claim

9.33 A person who has a civil dispute with a diplomat or other person entitled to diplomatic immunity has, if it is clear that immunity will preclude proceedings before the courts of the receiving State, three alternative channels through which he may try to obtain satisfaction:

1. He may try to institute proceedings before the courts of the diplomat's home State. Although Article 31 of the Vienna Convention makes clear that the immunity from jurisdiction of a diplomatic agent in the receiving State does not exempt him from the jurisdiction of the sending State, there are many practical obstacles to such a course. The prospective plaintiff must seek legal advice in the sending State. If he commences proceedings it may be impossible to serve process on the diplomat while he is entitled to inviolability in the receiving State, and the diplomat may leave his post only to proceed directly to another. Even if proceedings are validly instituted in some way it will be difficult to persuade witnesses to travel to another State to give evidence, and there will be many matters, such as disputes over real property in the receiving state, where the sending State has no jurisdiction. For some kinds of action however, such as family proceedings, resort to the courts of the sending State is likely to be the best course.
2. He may lay the matter before the ambassador of the sending State hoping to have his assistance in obtaining a settlement. Where there are no complex legal or factual matters in dispute this procedure will often secure quick

[40] 97-CV-03118 (TPH) DC, 2 May 1998.

redress. A member of mission who has been dilatory in settling a debt or a claim for damages will be reluctant to have the matter reported to his government with possible adverse comment on his behaviour by his ambassador.

3. He may lay the matter before his own government, usually before the ministry of foreign affairs, and ask them to intervene with the head of mission concerned. There are no legal rules as to what action may be taken in such a case. Practice of the Foreign and Commonwealth Office in London is to intervene only when three conditions are satisfied. The complainant must first produce satisfactory evidence of a prima facie legal case. Secondly, he must have exhausted other methods of obtaining settlement (by drawing the matter clearly to the attention of the member of mission concerned and of the head of mission). Thirdly, there must be evidence that the defendant is sheltering behind diplomatic immunity (so that, for example, the Foreign and Commonwealth Office will not intervene if there appears to be no immunity because the diplomat's appointment has ended or the matter relates to a claim against a member of the administrative and technical staff which is clearly of a private nature).

9.34 In many cases taken up by a ministry of foreign affairs the representations will be sufficient to obtain satisfaction for the claimant. If there are important differences between the parties, the ministry of foreign affairs may use its good offices to a limited extent to assist towards a settlement, but it will normally be reluctant to put itself in the position of arbitrator, because of the difficulty in testing evidence from the two sides and possible damage to its relations with the other government concerned. It may press for a waiver to enable the issue to be tried. It may suggest that the question be referred to arbitration and even assist in the arrangements to set up such an arbitration. If there are persistent complaints in regard to a particular member of mission as regards his conduct or his apparent evasion of his legal liabilities, the sending State may be asked to withdraw him and if it refuses, he may be declared *persona non grata.*

9.35 Alternative remedies available where diplomatic immunity raises a bar to criminal proceedings are discussed above at paragraph **9.**15.

Privileges of Diplomatic Agents

9.36 Five privileges accorded to diplomatic agents are specifically dealt with in the Vienna Convention—exemption from taxation, exemption from customs duties and baggage inspection, exemption from social security obligations, exemption from personal and public services, and special treatment under the laws of the

receiving State regarding the acquisition of nationality. The right to freedom of movement, which has already been discussed among the privileges and immunities of diplomatic missions in Chapter **8** above, may also be characterized as a personal privilege. In addition a diplomat may also be granted special privileges under the law of the receiving State in the absence of international obligation. For example, exemptions from local requirements regarding immigration formalities or registration by aliens are quite common, although there is no reference to them in the Vienna Convention. As explained at the outset of this chapter, a privilege gives substantive exemption to the diplomat from national law, and not merely protection from judicial or executive enforcement. Privileges are justified in principle by the peripatetic nature of the diplomatic career which would make it difficult as well as inappropriate for a diplomat on each new posting to gain understanding of the complexities of national laws on tax and social security, and reciprocity implies that overall States neither gain nor lose from exemption. Some privileges, for example exemption from jury or military service, are justified by the fact that diplomats owe their allegiance to the sending State and not to the receiving State.

Exemption from Taxation

9.37 Exemption from taxation in the receiving State is probably the most important of a diplomat's personal privileges. The principle was clearly established under customary international law, but States varied in the exceptions which they admitted to the general principle, and it was difficult to deduce general principles from the divergent and detailed provisions in the tax law of different States. Article 34 of the Vienna Convention now provides in general terms that a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, and sets out a list of exceptions to the general rule. There appear to be three types of taxation where a diplomat is *not* entitled to exemption.

9.38 The first category consists of taxes where it would be administratively impractical to make arrangements for exemption or refund. Taxes in this category include purchase tax, value-added tax, sales tax, and airport tax (where this forms part of the ticket price). These are described in the Vienna Convention as '(a) indirect taxes of a kind which are normally incorporated in the price of goods or services'. Some countries do in fact make arrangements under which a diplomat may escape paying sales tax or its local equivalent. He may be issued with a special card to show in shops in order to claim exemption from the tax element in the price of what he buys, and such a system of sales tax exemption cards is applied in the United States and (for petrol) in Belgium. In many countries coupons are issued by the receiving State to privileged persons for the purchase of petrol at tax-free prices. In the alternative, refunds may be made by the authorities on

presentation of receipts for purchases. The United Kingdom authorities make refunds in respect of value-added tax or car tax on only three categories of purchase—cars, alcohol and tobacco products purchased from bonded warehouses, and fine furnishings. In each case the articles must have been manufactured in the United Kingdom. The tax is substantial in these three cases and the United Kingdom wishes to encourage diplomats to buy a British-made article rather than take advantage of their exemption from customs duty to import foreign equivalents more cheaply. States administering such schemes have complex and changing local regulations and procedures designed to limit possible abuse. In major capitals, new diplomats are issued with a memorandum or handbook giving general guidance on immunities and privileges and up-to-date information about special entitlements in that country and procedures for claiming them.

9.39 The second category of tax which the diplomat must pay relates to activities which are extraneous to his proper activities in the receiving State. He must pay taxes on private immovable property in the receiving State 'unless he holds it on behalf of the sending State for the purposes of the mission'. If he acquires a holiday cottage, or a block of flats which he then lets to tenants, he must pay rates and property tax imposed on these premises. But if he holds the embassy premises in his own name, as he may be required to do by the legal requirements of the receiving State, he is not obliged to pay rates and taxes on them. The words 'unless he holds it on behalf of the receiving State for the purposes of the mission' clearly imply that no taxes are payable on the embassy premises held in the name of a member of the mission, but it is less clear whether their effect is to take a diplomat's principal residence out of the scope of the exception. As with the corresponding words in Article 31.1(a) the records of the Vienna Conference leave room for argument on the point, and not all States have adopted the same interpretation in regard to diplomatic residences. The United Kingdom regard the diplomat's residence (whether privately owned or leased or forming part of a government-owned block) as held by him 'on behalf of the sending State for the purposes of the mission'. They therefore accord relief from local taxes on such residences in London, and they do receive reciprocal treatment from the great majority of other States, although this does not always mean that the other State concerned adopts the same interpretation of the Convention. Some States believe that residences are not covered by the expression 'private immovable property'; others do not impose tax on residences at all, while others may be granting relief to United Kingdom diplomatic residences on a basis of reciprocity. The general principles applied in the formulation of Article 34 would suggest that residences should be exempt from tax, since the occupation of a residence is essential to living in the receiving State in order to perform diplomatic functions. Holiday homes

and premises which are leased are on the other hand extraneous to diplomatic activities and therefore properly taxable.

9.40 Another exceptional case in this category where the diplomat is liable to tax is 'estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39'. Article 39.4 in the special context of the death of a member of the mission deals with the question of export of his personal property (which must be permitted, with the exception of property acquired in the country the export of which was prohibited at the time of the death) and with estate or inheritance duty. It provides that '[e]state, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission'. These provisions taken together show the same functional approach to the question of tax exemption; the diplomat should not pay tax, or his estate be liable, in respect of matters which are a necessary part of his living and working in the receiving State. But if he acquires a substantial fortune or holds property in the receiving State which has no relation to his functions, estate or succession duty is payable on it.

9.41 A further exception in this category very clearly relates to matters which are not a necessary part of diplomatic work in the receiving State, namely 'dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State'. If the diplomat lets property privately or makes profits from investing on the stock exchange in the receiving State, he is liable to pay tax on these profits.

9.42 The final category of tax which the diplomat is liable to pay is the tax which is in reality a charge for a service. Article 34 lists among the exceptions to the general rule 'charges levied for specific services rendered'. The most frequent application of this exception is to local taxes and charges. Just as under Article 23 the embassy is made liable to that part of local rates or taxes which relates to services rendered to the property such as street cleaning and lighting, so under Article 34 the diplomat must pay such charges in relation to his residence. He may also be required to pay road or bridge tolls, where the proceeds are used for the upkeep of the particular road or bridge. In 1985 however diplomats entitled to tax privileges refused to pay a general 'surtax' imposed by the Swiss government on users of motorways and on heavy vehicles.[41] Many diplomats in London, following the lead of the United States, have also insisted that the congestion charge imposed

[41] (1985) *RGDIP* 177, 807.

by Transport for London is not a 'charge for a specific service rendered' but a tax. They have pointed in particular to the lack of proportionality in that the scheme imposes a flat charge regardless of the length of period of driving in the zone (which is claimed to be the 'specific service rendered'), the impossibility for most diplomats—given the nature of their duties—of staying outside the zone or of using public transport as an alternative, and the fact that the primary purpose of the scheme is not to raise revenue but to influence the conduct of drivers and thereby reduce traffic congestion.[42]

9.43 Also within this category of exception in Article 34 is 'registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23'. The dues described are, in general, not imposed in order to raise revenue but, to cover the administrative cost of providing the service of registration of immovable property. embassy premises are, however, exempt from these dues.

9.44 Article 34 is of necessity cast in very general terms, and to ascertain the precise position it is necessary to examine the tax laws, or at least the information circulated to embassies (whether in a memorandum, handbook, or circulars) in each State Party to the Convention. There are sometimes difficulties in applying the Convention to a particular new tax, and differences between sending and receiving States as to whether a particular tax has been correctly classed, as may be seen from the example of the London congestion charge just described. In these cases it is usually necessary to examine the purpose and nature of the particular tax, and it may also be helpful to ask whether on the general grounds of principle described an exception may be justified because relief would be administratively impractical, because the tax relates to essentially extraneous activities, or because the tax is in reality a charge for a service.

Exemption from Customs Duties and Baggage Search

9.45 Although it had for several centuries been the practice to grant diplomats exemption from customs duty on import of their personal effects and articles for their personal use or consumption, this was traditionally regarded as a matter of usage and not of binding customary law.[43] Exemption from customs duty has always

[42] For a fuller analysis of the arguments, see E Denza, *Diplomatic Law* (3rd edn, 2008) 370–3.

[43] E de Vattel, *Le Droit des Gens,* IV, VII, Sect 105; P Pradier-Fodéré, *Cours de Droit Diplomatique* Vol 2, 50–62; A McNair, *International Law Opinions* Vol 1, 204; *Harvard Research,* 26 *AJIL* (1932) (Supplement) 107.

been a privilege particularly susceptible to abuse. One notorious instance of abuse is described thus by Bismarck, speaking of Charles, Duc de Morny:[44]

> When he was appointed ambassador at Petersburg, he arrived with a whole string of fine, elegant carriages, and a host of trunks, boxes and chests, full of laces, silk-stuffs and ladies' dresses, for which as ambassador he had no duties to pay. Each servant had his own coach, each attaché or secretary two at least, and he himself quite five or six; and, as he was there, for a few days, he auctioned the lot—carriages and laces and wearing apparel. He must have made eight hundred thousand roubles. He was unscrupulous but amiable, he could really be most amiable.[45]

Governments may well have felt that their position in laying down national regulations to control abuse was stronger so long as the exemption from duty was regarded as a concession.

9.46 Article 36 of the Vienna Convention, however, obliges the receiving State to grant exemption from customs duties and taxes on articles for the official use of the mission and on articles for the personal use of a diplomat or a member of his family, including articles intended for his establishment (such as furniture or a motor car). But it is made clear that the exemption is to be granted in accordance with such laws and regulations as the receiving State may adopt. Missions must therefore consult the laws in the receiving State or the information supplied to diplomatic missions by the ministry of foreign affairs (by memorandum, handbook, or circulars as explained above) in order to ascertain what procedure should be followed to clear baggage or official consignments of goods through customs, whether any limits are imposed on the quantities of goods such as alcohol and tobacco which may be imported duty free while the diplomat is *en poste,* and what rules will apply if a diplomat wishes to dispose of goods he has brought in duty free. Regulations on such matters—either to prescribe procedures or to prevent abuse—are imposed by most countries and are clearly permitted under Article 36. But regulations imposed in bad faith or so restrictive as essentially to obstruct the exercise of the right to duty-free imports, may be challenged by sending States. In one country for example diplomats were severely limited in their imports of duty-free official cars in the hope that this would lead to more purchases of locally produced cars. But the restriction was challenged by the *corps diplomatique* who argued that its purpose was essentially protectionist and that because it partly undermined the right to import articles duty free it could not be justified under the provisions of Article 36.

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[44] Duc de Morny (1811–65) sent to St Petersburg in 1856 as French Ambassador Extraordinary to attend the coronation of Tsar Alexander II.

[45] M Busch, *Bismarck, Some Secret Pages etc.,* Vol 1, 503.

9.47 On the other hand, provided that the ambassador of the sending State certifies that a particular consignment is of 'articles for official use', the receiving State will ordinarily accept the duty-free import even of highly unusual items; for example the United Kingdom during the construction of new embassy premises in the Soviet Union imported building materials free of duty into the Soviet Union. Article 36 imposes an obligation to permit entry, as well as to exempt from duty, and so the sending State, provided that the articles are genuinely required for official use, would be justified in importing items such as medicinal drugs or alcohol, even where in the absence of privilege such items could not be imported without special licence or permission under the law of the receiving State. Diplomats are on the other hand not justified in importing for personal use articles whose import is forbidden under local law, unless they have specific authority from the receiving State. The powers given in this Article to search a diplomat's baggage for 'articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State' imply that the receiving State need not admit such articles. During the early period of Prohibition, the United States made clear that diplomatic missions were not entitled to bring alcohol into the country, and the import of alcohol into Muslim countries remains a shadowy area for diplomats. The import of firearms—whether for personal protection or for sporting purposes—is also subject to complex and changing national rules which must be checked by diplomats on each new posting.

9.48 Article 36 of the Vienna Convention also provides that

> [t]he personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorised representative.

In one incident illustrating this exceptional right of search, the Indonesian ambassador to Tanzania was found on inspection of his baggage to be about to export an illegal load of ivory weighing more than three tons.[46] The right to inspect the personal baggage of a diplomat in these exceptional circumstances is an important exception to the general inviolability of a diplomat's property in the receiving State. It should also be added that if a diplomat declines to allow his baggage to be inspected or tested by agents of an air carrier, under the practices which since the advent of hijacking and terrorism on aircraft have become general, the carrier is under no obligation to carry him.

[46] *The Times*, 21 January 1989.

9.49 No specific provision is made in Article 36 limiting the right to search incoming or outgoing consignments of articles for the official use of the mission. This is therefore a matter which the receiving State can regulate. The absence of any prohibition in the Convention made it possible for UK customs authorities in 1984 to investigate the suspect official crates which were found to contain the Nigerian ex-minister Umaru Dikko as well as some of those implicated in the plot to kidnap him (described more fully in Chapter **8**, paragraph **8.**39 above). It is of course open to the sending State to send any particularly sensitive items such as cipher equipment which it does not wish to be examined by the customs authorities of the receiving State with the seals and labels which give it the character of a diplomatic bag. Items in the bag must be for official use, but there is no other limitation on their character.

Exemption from Social Security Obligations

9.50 Article 33 of the Vienna Convention provides that diplomatic agents are, with respect to their work for the sending State, exempt from any social security provisions in the receiving State. Previously this exemption was not established in international custom, although some States expressly exempted diplomats in their legislation. In States where there was no express or implied exemption in regard to diplomats the position often was that the diplomat could choose whether he wished to participate, or rely on his immunity from jurisdiction if he did not wish to do so. No pressure appears to have been put on embassies to comply, except in regard to staff recruited in the receiving State. But this was not an entirely satisfactory position, and it was recognized at the Vienna Conference that exemption in substance was justified as a matter of principle for career diplomats, so that they could, in general, expect to be covered throughout their peripatetic career by the system of their home State, to which they were likely to return in the event of accident, illness, unemployment, or retirement. The Convention, however, permits voluntary participation in the social security scheme of the receiving State if this is permissible under the local law (although under the law of the United Kingdom for example such voluntary participation is not permitted). Sending and receiving States may also make more liberal or more restrictive arrangements in the context of bilateral social security agreements, for the Vienna Convention expressly provides that its own provisions on the matter do not affect bilateral or multilateral agreements, whether prior or subsequent, on social security. As with taxation and customs duties, the position in each State is complex and liable to variation so that it is essential for diplomats to find out the local requirements from the information supplied by the ministry of foreign affairs.

Exemption from Personal and Public Services

Exemption from compulsory services such as jury service and military service, from military obligations such as requisition and billeting, and from duties to assist in public emergencies such as floods or forest fires has traditionally been accorded to diplomats. In most cases they would not in any event, because of their nationality, be subject to civic duties. Exemption is now required under Article 35 of the Vienna Convention. **9.51**

Nationality

As a general rule, those States which confer nationality automatically on children born in their territory make an exception in regard to the children of diplomatic agents of other States (other than those diplomats who are their own nationals) and also make provision to ensure that children born to their own diplomats serving abroad acquire their father's nationality. States which conferred nationality exclusively or mainly by descent do not usually require to make special provision. But although the general principle was well understood and applied, the precise details varied from State to State, particularly on the question of which members of a diplomatic mission were covered by the exception. The Vienna Conference attempted to formulate a provision on the question for inclusion in the Convention, but the original draft of the International Law Commission, which was very wide in its application, caused difficulties to a number of States, since it did not in some respects accord with their policies in regard to nationality, and the less ambitious and more precise draft produced by a special Working Group did not satisfy other States. Neither of these proposals secured the necessary two-thirds majority for inclusion in the Convention, and so it was agreed to formulate the International Law Commission's text as an Optional Protocol concerning Acquisition of Nationality. Those States which supported the International Law Commission's text could then become parties to the Protocol. **9.52**

Article II of the Optional Protocol provides that '[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'. There were two main objections to this provision. The first was that it did not take sufficient account of the degree of connection between the child born and the receiving State. For example a child born to parents both of whom were permanently resident in the receiving State and whose father was a national of the receiving State (if the mother was a member of a mission and was not a national of the receiving State) would not acquire **9.53**

automatically the receiving State's nationality. The second was the possibility that in some cases the provision could give rise to statelessness—for example in the case of an illegitimate child born to a woman member of a diplomatic mission. The Protocol also has the effect of excluding the possibility of the nationality of the receiving State automatically being acquired on marriage to a member of a diplomatic mission, and this also caused difficulty for some States. The Protocol does not, of course, exclude the acquisition of nationality by naturalization, or by the exercise of rights to choose the nationality of the receiving State on a voluntary basis.

9.54 Because of these problems with the text, the parties to the Optional Protocol form a limited proportion of the parties to the Vienna Convention and do not for example include France, the United Kingdom, or the United States. States which are not parties to the Optional Protocol of course continue, in general, to apply local laws which accord with the broad principle established under customary international law. Where the matter may be of importance it is however essential for members of diplomatic missions to seek advice on local nationality laws.

Duties of a Diplomatic Agent

9.55 Certain duties laid on a diplomatic agent under customary international law may be said to be the corollary of the immunities which he enjoys in the receiving State. These duties are now set out in Article 41 of the Vienna Convention. The most important is his duty to respect the laws and regulations of the receiving State. A Memorandum on Diplomatic Immunity sent to all new diplomats taking up posts in London makes clear that

> [i]n accordance with Article 41 of the Vienna Convention on Diplomatic Relations members of diplomatic missions and their families are expected to respect the laws and regulations of the United Kingdom. Diplomatic immunity in no way absolves members of diplomatic missions or their families from their duty to obey the law. The police investigate all allegations that the law has been broken and report the result to the Foreign and Commonwealth Office. The Foreign and Commonwealth Office draws these to the attention of the Head of Mission (or sometimes a senior official).

Although a diplomat's immunity from jurisdiction does not imply any exemption from liability, special provisions are often made in the local law as explained above to provide that diplomats should be exempt from certain obligations—for example rules under local labour law—which are inappropriate to their special circumstances or might be argued to be incompatible with their status. In the absence of privilege or special exemption he is bound by local laws even though they cannot be enforced against him because of his immunity.

For example it is of the greatest importance that he should observe local motor traffic regulations, maintain his car to the standard legally required, and take out third party insurance wherever this is compulsory. In the United Kingdom it was established in the case of *Dickinson v Del Solar*[47] that an insurer cannot take advantage of the special position of a client entitled to diplomatic immunity to avoid making payment on a third party claim, since his client is liable in the event of his causing damage. But the Foreign and Commonwealth Office has sought to prevent any further argument on this by asking all insurers in this field to give them an assurance that they will not seek to take advantage of the privileged position of a diplomatic client. A list of insurers who have given this undertaking is circulated to missions in London, and the requirements of English law regarding licensing, maintenance, testing, and insurance of motor vehicles are specially drawn to their attention. There are similar schemes in a number of other countries designed to ensure so far as possible that diplomats carry insurance on which a plaintiff may rely in the event of accident notwithstanding the immunity of the diplomat himself. In the United States, for example, the State Department will not endorse applications for diplomatic number plates or for vehicle registration in the absence of evidence of insurance cover, and such insurance policies may not contain terms which an insurer might rely on to evade claims.[48]

9.56 The obligation to respect the laws and regulations of the receiving State applies to the official as well as the private activities of diplomats. For example a diplomat may only properly exercise consular functions on embassy premises if this is permitted under the law of the receiving State. Some States prohibit this and others require special permission, and Article 3 of the Vienna Convention was intended to make it clear that a diplomatic mission had no inherent right to perform consular functions regardless of the wishes of the receiving State. In particular, diplomats should not perform consular marriages on embassy premises unless this is permitted under local law. United Kingdom diplomatic service officers are not now permitted to perform consular marriages except where this is permitted under local law and the local law (which is the law of the place of marriage) will regard the marriage as valid. Many countries will not regard as valid a marriage performed by a foreign diplomat or consul in their territory, and this means that the marriage would be unlikely to be regarded as valid in any country other than the diplomat's sending State.

9.57 A second duty traditionally laid upon diplomatic agents, and restated in Article 41 of the Vienna Convention, is the duty not to interfere in the internal affairs of

[47] (1930) 1 KB 376.

[48] See Foreign Missions Amendments Act 1983, Public Law 98-164, 97 Stat 1017.

the receiving State. There have been a number of notorious instances where flagrant or unluckily discovered breach of that rule has led to the diplomat in question being declared *persona non grata.*

> In 1888 Lord Sackville, British Minister at Washington, received a letter purporting to come from a naturalised citizen of English birth, named Murchison, asking for advice as to the way he, and many other individuals in his position, should vote in the pending election of the President. Lord Sackville replied that 'any political party which openly favoured the mother country at the present moment would lose popularity, and that the party in power was fully aware of the fact.' With respect to the 'questions with Canada, which have been unfortunately re-opened since the rejection of the [fisheries] treaty by the Republican majority in the Senate, and by the President's message alluded to [by the writer of the letter], allowance must be made for the political situation as regarded the presidential election', and he enclosed an extract from a newspaper in which electors were distinctly advised to vote for Mr Cleveland. This letter of Lord Sackville found its way into the newspapers, and caused a lively discussion in the Press. The United States Secretary of State telegraphed to the United States Minister at London, complaining of the letter and of the language used by Lord Sackville at interviews with newspaper reporters, and suggested that Her Majesty's Government should take appropriate action without delay. Lord Salisbury declined to act until he should be in receipt of the precise language of Lord Sackville and his explanation. Lord Salisbury appears to have said also that the Minister's recall would end his diplomatic career, which would not necessarily be the case if he were dismissed by the United States, for which there were precedents. Mr Bayard thereupon addressed a note to Lord Sackville, informing him, by the instructions of the President, that he was convinced that 'it would be incompatible with the best interests and detrimental to the good relations of both governments that you should any longer hold your present official position in the United States' and enclosing a passport.[49]

9.58 It remains generally the case that diplomatic agents while informing themselves in regard to forthcoming elections and probable outcomes thereof must avoid public statements or actions which would be construed as supporting one candidate or party. Thus, for example, the US embassy in London in 2001 disassociated itself clearly from a fund-raising appeal by the Conservative Party which suggested that previous donors had through their generosity gained access to the outgoing US ambassador, explaining that to link the Ambassador to a fund-raising drive by any political party was incorrect and inappropriate.[50] The application of the general rule has however given rise in recent years to difficulties in many countries for two principal reasons. First, some States object to conduct on the part of foreign diplomats which overtly supports and encourages democratic

[49] *Papers Relating to the Foreign Relations of the U.S.,* 1888, pt. ii; B.F.S.P., Vol 81, 479; Moore, Vol 4, 536.

[50] *The Times*, 28 February 2001.

freedoms—for example seeking to meet or to listen to opposition candidates—and argue that this amounts to interference in their own internal affairs. The government of Burma, for example, has repeatedly condemned as intervention in its domestic affairs attempts by foreign diplomats to make contact with the pro-democratic opposition leader Aung Suu Kyi.[51] In 2008 a convoy of British and US diplomats on their way, during the extended elections in Zimbabwe, to investigate allegations of violence against members of the opposition Movement for Democratic Change were harassed and accused of 'trying to effect regime change in Zimbabwe'.[52] Secondly, international law now requires States to defend and actively protect human rights abroad, and the existence of multilateral commitments to respect human rights implies that breach of these commitments is no longer a matter of exclusive domestic jurisdiction but a matter of legitimate international interest. A diplomat is properly entitled to protect the interests of his sending State even where the receiving State may claim that this is improper interference, and the scope for protective action covers not only a case where a national of the sending State has suffered breach of his human rights but also where obligations to respect human rights are owed to the sending State through a multilateral treaty on human rights.

9.59 The third general obligation set out in Article 41 of the Vienna Convention is procedural in nature: 'All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed'. The general rule reflects the need for the ministry of foreign affairs to be aware of all aspects of relations between sending and receiving States so that particular problems and requests may be set within the wider context of overall relations. It has however long been the practice for specialist attachés to deal directly with the relevant specialist ministry. As international relations have become more technical in character and methods of communication more informal, it has become increasingly frequent that States agree between themselves to vary this rule in their daily business. It is still, however, highly advisable to ensure that the ministry of foreign affairs is kept generally aware of the substance of direct exchanges between an embassy and a specialist ministry.

[51] *The Times,* 6 September 2000.
[52] *The Times*, 6 June 2008.

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10

FAMILIES, JUNIOR STAFF, AND LOCAL NATIONALS

Families of Diplomatic Agents	10.2	**Private Servants**	10.12
Administrative and Technical Staff	10.5	**Nationals and Permanent Residents of the Receiving State**	10.14
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10.1 The previous chapter set out the scale of immunities and privileges which is accorded under the Vienna Convention on Diplomatic Relations to diplomatic agents who are not nationals or permanent residents of the receiving State. A majority of the individuals who are entitled under the Convention to some immunities or privileges do not, however, come into this category, and they receive privileged treatment on a lesser scale. Families of diplomatic agents, junior staff of the mission, and private servants of members of the mission are generally speaking ancillary to the conduct of diplomatic functions, although their presence and proper protection is essential to enable these functions to be carried out effectively. Article 37 of the Convention sets out in precise terms the immunities and privileges to be accorded to families of diplomatic agents, to members of the administrative and technical staff of the mission and their families, to members of the service staff of the mission, and to private servants of members of the mission. Nationals of the receiving State are entirely excluded from the provisions of Article 37. Permanent residents of the receiving State are excluded also unless they are members of the family of a diplomatic agent. Article 38 sets out the immunities to be accorded to diplomatic agents who are nationals or permanent residents of the receiving State. As explained below, in the application of those two articles it is essential to understand the distinction made there between acts done in or outside the course of a person's duties, and official acts performed in the exercise of a person's functions.

Families of Diplomatic Agents

10.2 The members of the family of a diplomatic agent forming part of his household, unless they are nationals of the receiving State, enjoy the entire range of diplomatic privileges and immunities. If they are nationals of the receiving State they have no direct entitlement to personal privileges or immunities at all, although the diplomat may use his exemption from customs duty to import free of duty articles for their personal use. Continuing immunity in regard to official acts is of course irrelevant in the case of a family member, who does not carry out official acts. In evidence to the UK House of Commons Foreign Affairs Committee enquiry into *The Abuse of Diplomatic Privileges and Immunities* the Diplomatic Service Wives Association justified immunities and privileges for diplomatic families in these terms:

> Families are regarded essentially as extensions of the persons of the diplomats themselves. The protection of diplomatic dependants has therefore been regarded as quite as necessary as that of the diplomats, to ensure the diplomats' independence and their ability to carry on their governments' business however unpopular their country, their mission or their instructions.[1]

10.3 The expression 'member of the family forming part of the household' is not defined anywhere in the Convention. Considerable effort was devoted during the Vienna Conference to the formulation of a definition, but none of those proposed obtained the necessary majority. The question of who may qualify as a 'member of the family' is thus in principle for negotiation between sending and receiving States, and there is no set procedure for determining differences of opinion. But States may establish reasonable guidelines for the interpretation of the term, and these will normally be applied in practice in the receiving State. Most States have not set out rigid rules on the matter and have preferred to retain sufficient flexibility to deal with unusual cases (such as polygamous diplomats arriving *en poste* with more than one wife) as and when they arise. For the most part, unusual cases are addressed at the time of notification of arrival rather than left for later resolution in the context of privileges or of legal proceedings. All States accept the spouse of a diplomatic agent as a member of the family. Spouse includes the husband of a woman diplomat—and such appointments have in the years since the Vienna Convention become frequent. In some States an unmarried partner is in this context accepted as a 'spouse', and more than one spouse

[1] 1st Report, 1984–5, Appendix 4 to Evidence. For a lively and fascinating account of the experiences of British diplomatic families from 1661 onwards, see K Hickman, *Daughters of Britannia: The Lives and Times of Diplomatic Wives* (Flamingo, 2000).

may also be accepted as a member of the family. More recently, same-sex civil partners are accepted as members of the family at least in States which make provision in their national law for civil partnership. The United Kingdom is among those countries, and 'members of the family' in its practice includes same-sex partners from other States provided that the relationship satisfies precisely defined criteria.[2] All States also accept the minor child of a diplomat as a member of the family, although there may be differences between sending and receiving State as to whether a child is still a 'minor'. Most receiving States apply their own national law to determine this question. Beyond these two categories state practice varies. The United Kingdom for the administration of privileges (a claim to immunity would under UK law be determined by the courts) normally accept as members of the family persons in the following categories: (i) a child between 18 and 25 clearly resident with the diplomat, financially dependent on him or her, in full-time education at a recognized educational establishment and not engaged in paid full-time employment; and (ii) in certain cases, a dependent parent of the diplomat normally resident with him or her. But these categories are not exclusive, and other claims to privileges as a member of the family of a diplomatic agent will be considered by the Foreign and Commonwealth Office in the light of the particular facts. A broadly similar approach is taken by Canada, Australia, New Zealand, Germany, Belgium, and the US, with exceptional cases being discussed between sending and receiving States.

10.4 As pointed out above in Chapter **9**, paragraph **9.**19, members of the family of a diplomatic agent are not barred by the Vienna Convention from exercising professional or commercial activities in the receiving State, and in exercising such activities they are not entitled to immunity from civil or administrative jurisdiction. In many receiving States, however, family members have been faced with obstacles to their working which may be social or cultural, political or economic—intended for example to reserve scarce employment opportunities for local nationals. Sending States where dual-career families are normal seek to enhance the mobility of their diplomatic services by making it easier for spouses in particular to continue their careers while living abroad, and of course a working spouse can contribute significantly to the diplomat's own understanding of the country which he is observing. It has therefore in recent years become frequent for States to conclude bilateral agreements which guarantee on a reciprocal basis that family members may carry on remunerated activity during a diplomatic posting, provide for an authorization procedure, stress the need for compliance with local requirements on qualifications, and (in some cases) contain

[2] For details of current UK practice, see E Denza, *Diplomatic Law* (3rd edn, 2008) 396.

express exclusions of tax privileges and immunity in regard to such employment. Given the clear exclusions in the Vienna Convention, this last provision is highly undesirable unless it is clearly drafted as being no more than a restatement of these exclusions, since it could suggest that in the absence of express bilateral provision the exclusions in the Convention were ineffective. In 1987 the Council of Europe drew up a model agreement to facilitate engagement in gainful occupation by family members of a member of a diplomatic mission or consular post.[3] This model also contains provision designed to encourage waiver of any immunity from criminal jurisdiction regarding acts carried out in the course of gainful occupation. Many European States have concluded bilateral agreements based on the Council of Europe model. The US State Department also drew up a model agreement, and the United States has concluded over 100 agreements with the objective of enhancing employment opportunities for family members of diplomats posted abroad.

Administrative and Technical Staff

10.5 The question of the privileges and immunities to be extended to the 'suite', as the family and junior staff of the mission were formerly called, was one on which there was no consistent practice among States. Some States, notably the United Kingdom, the United States, and Germany, extended the entire range of diplomatic immunities down the scale to domestic servants working in the embassy and private servants of the ambassador. Most States limited the privileges and immunities of junior staff in some way, but there were no consistent rules in regard to the limitations which might be imposed. The matter might be determined by reciprocity. The United Kingdom for example, from the enactment in 1955 of the Diplomatic Immunities (Restriction) Act,[4] limited on a precisely reciprocal basis the immunity which it extended to junior staff in diplomatic missions in London. The most restrictive States accorded to junior staff only the immunities which flowed from their status as agents of a foreign sovereign government, namely immunity in regard to official acts and exemption from taxation on their official emoluments. In the Vienna Convention, however, a clear distinction is drawn between those staff, termed the administrative and technical staff, whose work is highly responsible, who may be dealing at a lower level with diplomatic matters, and who whether as personal secretaries, as cipher clerks, or as wireless operators have access to diplomatic secrets, and on the other

[3] Recommendation No R(87)2 adopted by the Committee of Ministers of the Council of Europe and Explanatory Memorandum.

[4] 4 & 5 Eliz 2 c 21.

hand those staff whose functions are essentially domestic and who are not in direct contact with official matters, namely the service staff.[5] The first category require on functional grounds a greater protection than is afforded by immunity for official acts alone, whereas the second are not likely to be harassed or attacked for political reasons and therefore do not need the special protection of inviolability or immunity from jurisdiction in regard to their private acts. The distinction itself was readily accepted and the terms have quickly become standard diplomatic usage. But it proved difficult to agree on the exact treatment to be accorded to administrative and technical staff. The formulation in Article 37 resulted from compromise. It constituted progressive development in this area, and it has not been universally accepted.

10.6 There are no precise rules in the Convention or in practice as to which tasks are properly to be performed by 'administrative and technical staff' and which by 'service staff.' 'Members of the administrative and technical staff' are defined simply as the members of the staff of the mission employed in the administrative and technical service of the mission. 'Members of the service staff' are the members of the staff of the mission in the domestic service of the mission. It is for the sending State to notify the receiving State of the appointment of mission staff in the various categories, and it must therefore decide borderline cases, such as security guards and embassy teachers, for itself, acting in good faith. For example it is clearly improper to appoint staff to a staff category which is not justified by the work they do, simply to give them greater privileges and immunities. But the receiving State is not under the Convention given power to challenge a classification of staff or unilaterally to demand that they be assigned to a lower staff category. It can of course ask the sending State to reclassify particular staff, and some States do now challenge notifications which they regard as placing staff in categories inappropriate to their actual functions. But if the sending State refuses, or claims that special training or functions assigned for example to security officers justify a higher grading, the receiving State, if unwilling to acquiesce, can only declare the individuals *persona non grata* or not acceptable, or use its powers under Article 11 of the Convention to limit the number of staff appointed to a particular category.

10.7 Members of the administrative and technical staff, and members of their families forming part of their households, unless they are nationals or permanent residents of the receiving State, enjoy the same privileges and immunities as diplomatic agents, with two important exceptions. They do not enjoy immunity from

[5] Service staff in the Vienna Convention does not refer to the defence attachés (generally known in English as service attachés), or to other naval, military, or air force members of the mission. These are diplomatic staff.

civil and administrative jurisdiction in regard to acts performed 'outside the course of their duties'. They can never be tried on a criminal charge in any circumstances (unless their immunity is waived by the sending State), but they may be sued on personal matters, for example if they write a libellous article in a local paper, or fail to pay their children's school fees, or keep wild animals which escape and cause damage. The immunity given to administrative and technical staff in regard to acts performed in the course of their duties is wider than the immunity which is given to a diplomatic agent who is a national of the receiving State and which covers only 'official acts performed in the exercise of his functions'. The former expression would include acts performed during the working day which were reasonably incidental to employment with the embassy—for example driving to an official appointment. 'Official acts performed in the exercise of his functions', on the other hand, properly includes only those acts which are performed on behalf of the sending State. The expression 'outside the course of their duties' was construed in the English case of *Re B*[6] where the Family Division of the High Court decided that they could continue an interim care order made in respect of the child of a member of the administrative and technical staff of a foreign mission found to have suffered serious non-accidental injuries consistent with repeated hitting, on the basis that beating his child was not within the scope of the father's duties.

10.8 The second limitation on the privileges and immunities of administrative and technical staff as compared with diplomatic staff is that the former enjoy exemption from customs duty only in regard to those articles which they import when they arrive to take up their post. They cannot later import items free of duty, and in particular they cannot import wines, spirits, and tobacco duty free on a continuing basis as diplomats can. Each receiving State has exact regulations concerning 'first arrival privileges' (*première installation*), as the privilege given to administrative and technical staff is often called. Some countries may allow only one car to be imported on arrival in the receiving State. All countries have a period during which articles must be imported if they are to qualify as being 'imported at the time of first installation'. Some countries (including the United Kingdom) require articles to be imported within three months after the arrival of the staff member himself. Others are more generous and grant exemption from duty even where the articles are imported up to six, nine, or twelve months later. Most will allow an extension if there are special circumstances such as an unexpected delay in the shipment. The United Kingdom also expects items to be in the ownership or possession of the staff member when he arrives—or at least to

[6] [2002] EWHC 1751 (Fam); [2003] 1 FLR 241.

have been ordered by then. A staff member travelling to a different climate who wishes to import suitable clothing duty free after his arrival must at least place his order before travelling to the receiving State.

10.9 Four States—Egypt, Morocco, Cambodia, and Qatar—entered reservations which remain in effect to the provision in the Vienna Convention which regulates the privileges and immunities of members of the administrative and technical staff. They wished to accord to those staff only the much lower scale of privileges and immunities which under the Convention is given to service staff. A number of other States, mainly European, objected to those reservations but made clear that they nevertheless regarded the reserving States as parties to the Convention. Other States made reservations which were later withdrawn, or made clear that they would accord Vienna Convention treatment to administrative and technical staff only on a basis of reciprocity. China, which acceded to the Convention in 1975, stated in its instrument that it 'holds reservations . . . on the provisions of paragraphs 2, 3 and 4 of Article 37'.[7] This reservation applied to all junior staff and private servants, many States lodged objections to it and it was later withdrawn. Generally speaking, however, the reservations entered to the Vienna Convention have gradually become of limited importance as provisions which originally formed 'progressive development' of customary law have become universally accepted.

Service Staff

10.10 Service staff, defined as members of the staff of the mission in the domestic service of the mission, include embassy drivers, cooks, door-keepers, and cleaners. They differ from 'private servants' of members of the mission in being employed by the sending State and not by any individual member of the mission. They receive under the Vienna Convention only immunity *in respect of acts performed in the course of their duties*; exemption from tax on their wages, which may equally be regarded as an exemption for the sending State which pays these wages; and exemption from social security provisions. They are entitled to no immunities or privileges of a purely personal character. Service staff who are local nationals or permanent residents receive nothing. Embassy drivers are entitled to immunity from criminal and civil jurisdiction while driving on official duties—but not from a charge of murder of the ambassador, even though the driver was at the

[7] CN 354, 1975, Treaties 8.

time on embassy premises, within his hours of duty, and at the disposal of the mission.[8]

10.11 The limited privileges and immunities accorded under the Vienna Convention may of course be supplemented by more generous provisions under local law or practice, or by bilateral agreement between sending and receiving States. Article 47 expressly sanctions the giving of more favourable treatment than is required by the Convention where this is based on custom or agreement. The United Kingdom accords more generous treatment to junior staff in foreign missions only on the basis of agreements or arrangements already in force when it became a party to the Vienna Convention. It maintained in force a number of such agreements or arrangements providing for more generous exemption from customs duty for junior staff, and three agreements—with the Soviet Union, Bulgaria, and Czechoslovakia—which accorded inviolability of person and residence and personal immunity from jurisdiction on the diplomatic scale to junior staff.[9] Even where there is no explicit provision for according greater privileges and immunities to junior staff, it may also happen in many countries that administrative discretion will be used in their favour. For example, if a member of a foreign mission is detected shoplifting or driving while unfit through drink, the executive, if it has discretion over the initiation of criminal proceedings, may prefer, in order not to damage relations with the sending State, to send a private account of the matter to the ambassador rather than institute criminal proceedings. The United States also has power under the Foreign Missions Act 1982[10] to provide, on a basis of reciprocity, more generous treatment than required by the Vienna Convention and this power is used to implement bilateral agreements with former Soviet Republics and with China. Information as to special agreements or arrangements will normally be made available to embassies by the ministry of foreign affairs.

Private Servants

10.12 In traditional diplomatic practice, the private servants of the ambassador were regarded as members of his 'suite' and entitled to at least some privileges and immunities on that basis. The Vienna Convention, however, distinguishes

[8] *Ministère Public and Republic of Mali v Keita* 1977 Journal des Tribunaux 678; 77 ILR 410, Brussels Court of Appeal.

[9] Details of arrangements and agreements were published in the *London Gazette* of 1 October 1964, and amended on 1 September 1966 (by the removal of Hungary on termination of the relevant arrangement).

[10] Public Law 97-241; 22 US Code s 4301 *et seq*.

between service staff, employed by the sending state, and the private servants of members of the mission. No distinction is made between the private servants of the ambassador and the private servants of other members of the mission. Private servants who are not nationals or permanent residents of the receiving State enjoy two privileges only (both of which are in reality for the benefit of their employers). They are exempt from tax on the emoluments of their employment and, on condition that they are covered by social security in another State, they are exempt from the social security provisions of the receiving State. This is primarily to the advantage of the diplomatic employer. He does not have to pay such high wages as he would if they were subject to tax and social security deductions by the receiving State, and he does not have to master the intricacies of tax and social security law in each of the countries to which he may be posted along with his servants. A private servant who has accompanied a diplomat will usually continue to contribute to social security schemes in the sending State and is also likely to be liable to tax on his or her wages there—though the exact position will depend on the terms of any double taxation agreement as well as on the Vienna Convention.

10.13 The Vienna Convention also provides that jurisdiction over private servants must be exercised 'in such a manner as not to interfere unduly with the performance of the functions of the mission'. This means in practical terms that the local police should not arrest the ambassador's cook and detain him on criminal charges on a day when the ambassador is giving an important dinner party. The authorities should try to fix dates for the hearing of civil claims or criminal charges against private servants in such a way that the diplomatic employer is not seriously inconvenienced. It must also be remembered that if the private servant is living, as he will usually be, with his diplomatic employer, proceedings cannot be begun against him by service of process, or a judgment against him executed in such a way as to infringe the inviolability of the residence of the diplomat.

Nationals and Permanent Residents of the Receiving State

10.14 The exclusion of nationals of the receiving State from privileges and immunities was common, although not universal, under customary international law. The writers on international law were conscious of the special problems posed if a national of the receiving State was accepted in the capacity of a diplomatic agent, but they were not consistent in the conclusions they drew. Adair writes in this way of Wicquefort, whose famous book *L'Ambassadeur et ses Fonctions* appeared in 1681:

> Wicquefort, however, had in his own person experienced the dangers to which ambassadors might be exposed, for, though by birth a Dutchman, he had resided in

> Holland as agent for the Duke of Lüneburg and while there had been condemned to perpetual imprisonment for communicating Dutch secrets of state; he therefore gives very vigorous support to the view that an ambassador possesses full immunity no matter what his nationality may be, if he has been accepted in such capacity by the receiving state, for he represents the actual person of the sovereign who has sent him and who cannot be subject to a foreign jurisdiction; in addition, any such subjection on the part of an ambassador would so limit his freedom of action as to make it impossible for him to perform the duties of his embassy. The only qualification he would admit is that, if the ambassador has himself violated the law of nations, he cannot call upon it for protection; this is vague, and even here no greater punishment can be inflicted than a demand for the ambassador's recall. If one turns, however, to the earlier and smaller version of this work, published in 1676, one finds that there Wicquefort speaks with a very different voice: an ambassador should certainly be secure, but if he attempts the life of the prince, conspires against the state, or even gives information to its enemies, he becomes a traitor and this is incompatible with his position as an ambassador; therefore there is no longer any necessity to respect his privileges or to observe those rules of international law which he himself has broken, though, Wicquefort adds, a prince will have more honour if he sends back to his master an ambassador who has become a criminal than if he punishes him himself. Five years later Wiquefort is seen upholding the ambassador's complete immunity; it is surely not unkind to suspect that his own long imprisonment was responsible for this drastic change in his views.[11]

Some States avoided the problem by refusing altogether to accept their own nationals as diplomats representing another State, and of those who were willing to accept them some gave them full privileges and immunities, some gave them no privileges and immunities (or only immunity for official acts), and some regulated the matter expressly at the time of receiving the diplomatic agent, usually by reserving the right to withhold immunities and privileges.

10.15 The Vienna Conference, however, was firmly in favour of excluding nationals of the receiving state from all personal privileges and immunities. Junior staff are not even accorded immunity in regard to official acts, though this would not prevent the sending State in appropriate cases from arguing before a court that these acts were in reality acts of a foreign sovereign and therefore for reasons of sovereign immunity not within the jurisdiction of the receiving State. Diplomatic agents who are nationals or permanent residents of the receiving state enjoy under Article 38 of the Vienna Convention *only* immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions. The wording makes clear that both the inviolability and the immunity are limited to official acts. The acts covered are only those which are in some sense performed on behalf of the sending State. Incidental acts performed during the working day, or necessary for the conduct of life in the receiving State, such as the renting of

[11] *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries,* 312.

living accommodation, or driving to an appointment, may be said to be 'in the course of duties' (the expression used in Article 37 of the Convention) but they are not 'official acts performed in the exercise of his functions'. While the embassy chauffeur would, as pointed out above, be acting in the course of his duties when driving his ambassador to an appointment, if he caused an accident he would have no immunity under Article 38 if he was a national of the receiving State; while the ambassador though *acting in the course of his duties* would not be *performing an official act in the exercise of his functions* if he drove himself and so, if he were a national of the receiving State, not immune from subsequent legal proceedings.

10.16 Among Commonwealth countries, dual nationals of sending and receiving States are treated, for the purposes of privileges and immunities, as though they held only the nationality of the sending Commonwealth State. This is an example of the 'more favourable treatment' which is permitted under Article 47.2(b) of the Vienna Convention where it is based on custom.

10.17 The main difficulty which arises in regard to the provisions of Article 38 results from the exclusion of 'permanent residents' as well as local nationals from virtually all privileges and immunities. Whether a person is a national of the receiving State is under general principles of law to be determined by the law of that State. But the exclusion of 'permanent residents' from privileges and immunities was not common in national legal systems before the Convention. 'Permanent residents' were added to the text of the Convention at a very late stage and without much discussion, and the term is not defined nor a procedure for resolving differences over its application prescribed in the Convention. The United Kingdom government soon found that the interpretation of the term was difficult and gave rise to differences with individual missions. In the light of several years' experience of administering the régime under the Convention, and in an effort to avoid the arguments over particular cases which wasted time and caused friction, the United Kingdom government elaborated working criteria which they circulated on 27 January 1969 to all diplomatic missions in London for their guidance. The guidance read, in part, as follows:

> When determining whether or not a particular member of your staff should be regarded as a permanent resident of the United Kingdom the test should normally be whether or not he would be in the United Kingdom but for the requirements of the sending State. In applying this test I suggest that you should be guided by the following considerations:
>
> (i) the intention of the individual; a person should be regarded as permanently resident in the United Kingdom unless he is going to return to his own country or proceed to a third country as soon as his appointment in the United Kingdom ends. It is suggested that points which may be relevant to this question include

the links of the individual with the State which he claims as his home, e.g. payment of taxes, participation in social security schemes, ownership of immovable property, payment of return passage by the sending State.

(ii) the prospect of the individual being posted elsewhere as a career member of the service; he should be regarded as permanently resident in the United Kingdom if his appointment in the United Kingdom is likely to continue or has continued for more than five years, unless the Head of Mission states that the longer stay in the United Kingdom is a requirement of the sending state and not a result of personal considerations.

(iii) local recruitment of the individual; a person who is locally engaged is presumed to be permanently resident in the United Kingdom unless the Head of Mission concerned shows that he is going to return to his own country or to proceed to a third country immediately on the termination of his appointment in the United Kingdom; and

(iv) marital status of the individual; a woman member of the Mission who is married to a permanent resident of the United Kingdom is presumed to be herself permanently resident in the United Kingdom from the time of her marriage unless the Head of Mission shows that in addition to her satisfying the other criteria, there remains a real prospect in view of the special circumstances of her case that she will be posted as a normal career member of the service.

If a review in the light of this guidance leads Your Excellency to conclude that any of your staff should henceforward be regarded as permanent residents of the United Kingdom for the purposes of the Diplomatic Privileges Act, I suggest that any change in status should take effect from 1st April 1969 and would request that such cases be notified to this Office by that date. Thereafter it would be helpful if Your Excellency could arrange for prompt notification to this Office of any change in the residential status of members of your staff. Should a difference of opinion arise between a Mission and Her Majesty's Government as to whether an individual is permanently resident in the United Kingdom, I suggest that consultation should take place between the two sides and that each side should inform the other of any relevant evidence which may be in their possession.

This guidance has been followed by the UK in administering privileges since 1969 and, although consultations as envisaged have sometimes taken place, it has not been generally challenged by missions in London. In 2004 it was judicially considered by a Special Tax Commissioner for the UK in the case of *Lutgarda Jimenez v Commissioners of Inland Revenue*.[12] It was held in that case that the guidance followed since 1969 constituted 'subsequent practice in the interpretation of the application of the treaty which established the agreement of the parties regarding its interpretation' and now reflected customary international law.[13] The key test in the Circular was whether the individual was resident in the

12 [2004] UKSPC 00419 (23 June 2004).

13 See Article 31.3 of the Vienna Convention on the Law of Treaties.

receiving State for a purpose unconnected with the holding of the status of membership of the mission.

10.18 A number of other countries have since 1969 drawn up practice guidelines on the meaning of 'permanently resident in the receiving State' which are broadly similar to those applied by the United Kingdom (though without the discriminatory limitation to 'a woman member of the mission' in the context of marriage to a local national). The United States when it first became a party to the Convention defined 'permanent resident' in the sense which it had in US immigration law, but in 1991, in a Circular Note to Chiefs of Mission in Washington, set out revised criteria similar to, but more restrictive than the criteria applied in other capitals. The United States asserts more strongly a right to make a unilateral determination of whether an individual is permanently resident in the receiving State, though it does this in the light of evidence and assurances from sending States. It also offers the possibility of more favourable treatment on a basis of reciprocity, as permitted under Article 47 of the Vienna Convention.

10.19 Most States accept the possibility of a change in residence status during a diplomatic posting, but France is an exception in this regard and determines residence status on an indefinite basis at the time of original appointment and notification. The difference in approach between France and the United Kingdom was settled in 1987 by a compromise agreement whereby the UK authorities would accept the original determination for a period of 10 years in post. At this point the status would be reviewed and, for non-permanent resident status to continue, an assurance would be required from the relevant ambassador that continuation in post was the result of a decision by the sending State (rather than the personal wish of the individual).

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11

DIPLOMATIC AGENTS IN THIRD STATES

Passage in Time of War	11.11
Duties of Diplomatic Agents in Third States	11.13

Two questions arise for the diplomatic agent who wishes to cross a third State on his way to or from the State where he has been appointed. Does international law give him an automatic right of passage, at least in time of peace, and is he entitled to any special privileges and immunities while he is passing through? Practice on both matters varied considerably at different periods. **11.1**

During the sixteenth and seventeenth centuries it was the custom for diplomats who wished to cross foreign territory on the way to their post, and indeed for private persons, to seek the assurance of a safe-conduct from the ruler of the foreign territory concerned. States might provide in general terms for the safe passage of their ambassadors in transit, as did Britain and Russia in a Treaty of 1623, which protected: 'Ambassadors, Messengers or Posts through the Countries and Dominions of the other unto and from Germany, France, Spain, Denmarke, Sweathland and Netherland, or unto and from Persia, Turkey and other Partes of the East, which are not in open Hostilities with either of their renowned Majesties. . . .'[1] Gradually the practice of seeking safe-conducts fell into disuse but States until the nineteenth century accepted that the ambassador had a right of innocent passage through third States on his way to his post. It was clearly to the advantage of all States that this should be the position and legal restrictions on immigration or on the movement of aliens within a territory were still uncommon. **11.2**

During the late nineteenth and early twentieth centuries, however, controls on travel became general and States became more restrictive, requiring foreign **11.3**

[1] De intercursu mercandisarum cum imperatore Russiae, Rymer, *Foedera,* Vol 17, 506.

diplomats to obtain a prior visa if such a visa was necessary for an ordinary traveller of the same nationality. The reaction of the French government to the transit of M. Soulé indicates this new attitude:

> In 1854 the French Government refused to M. Soulé, United States minister at Madrid (of French origin, but naturalised in the United States, and said to have been 'of a fiery temperament') permission to stay in France on his way to his post, on the ground that his antecedents had attracted the attention of the authorities charged with public order; they had no objection to his merely passing through, but as he had not been authorised to represent his adopted country in his native land, he was for the French Government merely a private person, and as such subject to the ordinary law.[2]

11.4 In the vast majority of cases a visa, or permission to transit on production of a diplomatic passport was granted as a matter of course, but where the diplomat was not acceptable to the third State, or the third State had no diplomatic relations with either the sending or the receiving State, he would find that the 'right of innocent passage' was of little practical significance. Article 40 of the Vienna Convention is clearly based on the assumption that the diplomat has no right of transit across a third State, and that he is not exempt from obtaining a visa for such passage in the ordinary way. The old right of passage has in fact become of much less practical significance now that air travel has become general, since diplomats usually do not need to enter third States in order to proceed to or from their post. Such transits do however still occur, whether in the context of changing aircraft or otherwise, and in such cases the immigration authorities are entitled to require a transit visa or a passport inspection.

11.5 On the question of whether an ambassador in transit was entitled to privileges and immunities the early writers were unanimous that he had no such entitlement. His special position, if any, depended on the terms of a safe-conduct, or on a special bilateral agreement, or on courtesy. But later practice was more varied. A few States, such as the Netherlands, in their ordinance of 1679,[3] and France, under the decree of 13 ventose, an II (of the Revolution), made provision in their legislation to treat diplomats in transit in the same way as diplomats accredited to the State. A series of United States cases, *Holbrook v Henderson*,[4] *Wilson v Blanco*,[5] and *Bergman v De Siéyès*,[6] established in that country that the diplomatic agent in transit to or from his post was entitled to immunity from jurisdiction. The view

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[2] J B Moore, *Digest of International Law,* Vol 4, 557; J W Foster, *Practice of Diplomacy*, 53.

[3] UN Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities (*UN Legislative Series* Vol 7, 201).

[4] (N.Y. 1839), 4 Sandf. 619.

[5] (N.Y. 1889), 4 N.Y. Suppl. 714.

[6] 71 F. Suppl. 334; 170 F 2d 360; *AD* (1947), No. 73.

was taken in these cases that such immunity was necessary for the free and unimpeded exercise of diplomatic duties, and that to oblige a diplomatic agent to attend the trial of an action in a third State was more inconvenient than to oblige him to attend one in the receiving State. Where difficulty might be caused by the uncertain state of the law, matters could be regulated by agreement as was done in the Lateran Treaty between Italy and the Holy See of 11 February 1929, which provided:

> Article 12: Italy recognises the right of the Holy See to active and passive legation in accordance with the general rules of international law. Envoys of foreign governments to the Holy See shall continue to enjoy in the Kingdom all the privileges and immunities appertaining to diplomatic agents in virtue of international law, and their headquarters may remain in Italian territory and shall enjoy all the immunities due to them in accordance with international law, even if the states to which they belong maintain no diplomatic relations with Italy. It is understood that Italy undertakes always and in every case to leave free the correspondence from all states, including belligerents, to the Holy See, and *vice versa:* . . . In virtue of the sovereignty recognised, and without prejudice to the provisions of Article 19 below, diplomatists of the Supreme Pontiff shall enjoy in Italian territory, even in time of war, the treatment due to diplomatists and carriers of despatches of other foreign governments, in accordance with the rules of international law.
>
> Article 19: Diplomatic officers and envoys of the Holy See, diplomatic officers and envoys of foreign governments accredited to the Holy See . . . possessing passports issued by their state of origin and visés by Papal representatives abroad, shall be admitted without further formality to the City across Italian territory. The same shall apply to the above-mentioned persons, who, being furnished with regular Papal passports, are proceeding abroad from the Vatican City.

11.6 Article 40 of the Vienna Convention adopts a strictly functional approach to the question of the privileges and immunities to be given to a diplomatic agent passing through a third State to or from his post. The third State is obliged only to accord him 'inviolability and such other immunities as may be required to ensure his transit or return'. The same inviolability and immunities are required in the case of members of his family enjoying privileges or immunities who are accompanying him or travelling separately to join him or return to their country. The diplomat and his family in transit are therefore entitled to the special protection and freedom from arrest or detention implied in inviolability, but any civil proceedings may be brought against them provided that these do not involve their arrest, and they have no privileges such as exemption from baggage search. In 1972 in the Netherlands (at that time not yet party to the Vienna Convention but applying most of its provisions) a search of the luggage of an Algerian diplomat in transit to Brazil found that it contained letter bombs, grenades, other explosives, and pistols. They confiscated the luggage but allowed the diplomat to

continue his journey since they took the view that they were unable to arrest or charge him.[7]

11.7 A diplomatic agent is entitled to these limited immunities irrespective of the relations between his sending and receiving State on the one hand and the third State on the other. The obligations in Article 40 apply even where the presence of the diplomat (or other entitled person, or diplomatic bag) is due to *force majeure,* such as the forced landing of an aeroplane, but it is not entirely clear whether it would override the traditional rules and practice which apply during a state of war. Armed conflict is specifically mentioned in relation to the general right of a diplomat to leave the receiving State and in relation to breach of diplomatic relations, but not in regard to transit of a third State. To benefit from the immunities in Article 40 a diplomat must be accredited to a specific receiving State. In the case of *R v Governor of Pentonville Prison, ex parte Teja*[8] in 1971 a United Kingdom court refused to allow immunity from extradition proceedings to Dr Teja, a Costa Rican 'roving envoy' who carried a diplomatic passport, but was neither accredited to nor received by the government of any particular country. It is also essential that the diplomat should be appointed by a government which is recognized as such by the third State. Emissaries of 'national liberation movements' which are not recognized by the third State, or of other unrecognized States or governments such as the régime illegally set up in Rhodesia in 1965, for example, would not be entitled to immunity in third States under the Vienna Convention.

11.8 It was established in customary international law, and remains the position under the Vienna Convention that the diplomat who is in a third State for recreational or other private purposes, or who pauses during his transit to or from his post for a prolonged private holiday, is entitled to no immunity. As Rivier pointed out: 'If he is there solely for his own pleasure, or in pursuit of some merely private object, he is merely a distinguished personage, neither more nor less'.[9] It is not however necessary, for Article 40 protection to apply, that the diplomat or family member should be travelling directly between the sending and the receiving State, provided that he or she is either proceeding to post or returning to his or her own country. This was illustrated by the UK case of *R v Guildhall Magistrates' Court, ex parte Jarrett-Thorpe.*[10] Jarrett-Thorpe was the husband of a diplomat in the embassy of Sierra Leone to Italy who travelled to London to assist his wife with official purchases for her embassy in Rome, found that she had already left, and was arrested while awaiting a flight to rejoin her in Rome. The court held that he

7 UN Doc.S/10816; (1974) *RGDIP* 247.
8 [1971] 2 QB 274; [1971] 2 All ER 11.
9 *Principes du Droit des Gens,* Vol 1, 508.
10 Times Law Reports, 6 October 1977.

was immune from the criminal jurisdiction of the UK even though he was not actually accompanying his wife and was not in direct transit between sending and receiving States. By contrast, a Belgian Court of Cassation in the case of *Vafadar*[11] denied immunity to the wife of the ambassador of Afghanistan to India who was arrested while passing through Belgium in order to visit her sick mother in Moscow, as she was neither travelling to the country where her husband was in post nor returning to her own country.

11.9 Third States are also obliged not to 'hinder the passage' through their territories of members of the administrative and technical staff of a mission and members of their families proceeding to or from their posts. This does not mean that these persons have any immunity, but merely that the third State must not inconvenience or delay them without good cause. Service staff and private servants receive no special treatment in third States. Diplomatic agents who are nationals or permanent residents either of the receiving State or of the third State itself are not specifically excluded from the terms of Article 40; but it is of course very unlikely that such persons would be passing through or in the territory of the third State en route for their post or returning to their own countries.

11.10 Official correspondence and other official communications, diplomatic couriers, and diplomatic bags in transit through third States are entitled under Article 40 to the same inviolability and protection as the receiving State is bound to accord under Article 27.

Passage in Time of War

11.11 Under customary international law a State was entitled to arrest the diplomatic agent of a hostile State during war with that State and treat him as a prisoner of war.[12] For that reason it was invariable practice for diplomatic relations to be broken before a formal declaration of war. Where transit through another country at war was necessary, a safe-conduct would be sought:

> In 1917 Herr von Heinrichs, former Secretary to the German Embassy at Madrid, while on his way to Mexico to take up another appointment, was made prisoner on landing in Cuba, then at war with Germany.[13]
>
> In 1918 Captain von Krohn, naval attaché to the German Embassy at Madrid, was, at the request of the Spanish Government granted safe-conduct by the French

[11] 82 ILR 97.
[12] Hall, *A Treatise on International Law* (Oxford, 1924) 365.
[13] Oppenheim, *International Law* (8th edn, Lauterpacht, 1955) Vol 1, 398.

> Government, to permit of his return to Germany through France, a prescribed route being enjoined.[14]

11.12 These rights were, however, given to belligerents and presupposed the existence of a formal state of war. Since 1945 the formal declaration of war between States has become a rare event, and conflicts between independent States are normally described as 'armed conflicts'. It must therefore be regarded as uncertain whether States involved in an 'armed conflict' are entitled to exercise in regard to diplomats in transit what are essentially belligerent rights. Article 40 of the Vienna Convention is not expressly limited to passage by diplomats in time of peace, nor does it refer to 'armed conflict' although other Articles of the Convention clearly deal with the contingency of armed conflict between sending and receiving States. In the Preamble to the Convention the Parties affirm 'that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'. However, the matter may probably now be regarded as of limited importance, since general air travel means that it will hardly ever be necessary for a diplomat to traverse hostile territory on the way to or from his post and it is clear that he would be extremely ill-advised to do so.

Duties of Diplomatic Agents in Third States

11.13 A diplomatic agent, in the absence of a mandate or the permission of his government, is in no way authorized to intervene in the external or internal affairs of a third State. The prohibition is similar to that imposed on him in regard to the internal affairs of the receiving State—discussed in Chapter **9**, paragraphs **9**.57 and **9**.58 above. A diplomatic agent is of course obliged to respect the laws of the transit State, and those of any other third State, just as he is obliged to respect those of the receiving State, and his immunity in transit implies no exemption from these laws.

[14] R Genet, *Traité de Diplomatie,* Vol 1, 596.

12

PRIVILEGES AND IMMUNITIES OF THE HEAD OF A FOREIGN STATE AND MINISTERS

The Law Relating to the Status of the Head of State	12.1	**The Obligation of Due Respect**	12.11
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The Law Relating to the Status of the Head of State

Despite the codification of the law concerning diplomats and consuls and the adoption of the 2004 UN Convention setting out the law which regulates the immunities of the State itself,[1] it is a curious anomaly that the position of the head of state and the personal privileges and immunities which attach to that office remain largely based on customary international law. The Vienna Convention on Diplomatic Relations of 1961 (which is discussed in detail in **Chapters 8** to **11**) does not deal with the personal privileges and immunities of the head of state, although its provisions ought certainly to be taken as indicating the minimum standard to be afforded; as the Canadian minister of foreign affairs noted in 1981 'even greater respect is owed to the visiting sovereign or head of State, since his **12.1**

[1] See Chapter **2**, paragraphs **2.1**–**2.2**.

own diplomatic envoys in the host State are clearly inferior to him'.[2] The New York Convention on Special Missions of 1969 provides that heads of state leading a special mission shall enjoy 'the facilities, privileges and immunities accorded by international law to Heads of State on an official visit', but it does not define in any detail these facilities, privileges, and immunities. The 2004 UN Convention on State Immunity covers the immunities of the head of state when acting in a public capacity but says nothing as to the position regarding personal immunities. This limitation derives from a clear distinction drawn in the law of many States,[3] and implied in that of others, between the head of state acting *ratione materiae* as part of the legal entity, the State, and the head of state acting as an individual *ratione personae* to whom a high degree of personal privilege and immunity is granted. The UN Convention on State Immunity applies this distinction between the public and personal activities of the head of state, so that sovereigns or other heads of state acting in a public capacity *ratione materiae* as state organs or state representatives fall within the 2004 Convention's definition of the State and hence are covered by the immunities and exceptions there set out at Article 2.1(b)(i) and (iv). But the 2004 Convention expressly states that its provisions are 'without prejudice to privileges and immunities accorded under international law to heads of state *ratione personae*', Article 3.2.

The Justification for the Privileges and Immunities of a Head of State

12.2 The justification for the privileges and immunities lies both in the respect due to a head of state's status as principal representative of the State and to enable the effective performance of the functions of the office.

12.3 Accordingly, the primary basis in international law for a grant of jurisdictional immunity to the head of a foreign State before national courts is, as with the State itself, the status of the litigant as the prime representative of the foreign State. However, with the adoption of a restrictive doctrine of state immunity[4] the basis of the plea shifts from the personal status of the litigant, immunity *ratione personae*, to the subject matter of the act which is performed, immunity *ratione*

[2] Can. *YBIL* (1981) 325, Memorandum of the Canadian Minister of Foreign Affairs, 31 January 1981.

[3] The UK SIA s 14(1)(a), the Singapore State Immunity Act 1979 s 16(1)(a), the Pakistani State Immunity Ordinance 1981 s 15(1)(a), the South African Foreign State Immunities Act 1981 s 1(2)(a), and the Australian Foreign Sovereigns Act 1985 s 3(4)(b) all provide that any reference to a foreign state shall include the head of that state in his or her public capacity.

[4] See Chapter **2**, paragraph **2**.4.

materiae. In respect of immunity of individual persons the terms have a further meaning by which personal immunity, immunity *ratione personae*, enjoyed by an individual has come to be construed to apply to acts of whatever nature, private or public, performed while in office, for example the purchase of an article for private use or as a personal gift, whereas subject matter immunity *ratione materiae* is restricted to acts performed in the exercise of the functions of the office on behalf of the State.

Source of Law

12.4 The personal status of a head of a foreign State continues to be derived from customary international law, with the decisions of the International Court of Justice providing a degree of authoritative interpretation.[5] Until the continuing immunity of a former head of state was challenged in the English court on the occasion of a request for the extradition of General Pinochet to stand trial in Spain for certain international crimes,[6] few cases relating to the legal status of a head of state had come before national courts with comity between States in friendly relations supplementing any uncertainty as to law. The UK State Immunity Act 1978, s 20 and the Australian Foreign Sovereigns Act 1985, s 36 seek to clarify the position by applying the Vienna Convention on Diplomatic Relations 1961 to the head of state when acting in a personal capacity and thereby to accord in their national laws the same treatment as that which the head of a diplomatic mission enjoys. This approach has some advantages in that the immunities afforded to diplomats under the Vienna Convention are reasonably well known; but it has disadvantages, as the Pinochet case showed. Unlike the diplomat whose privileges and immunities are confined to the period when he is present within the territory of another State, the international obligations with regard to a serving head of state of respect, protection, and immunity from jurisdiction apply whether the head is located abroad or in the home State, and with regard to all States, not merely the receiving State. Other States including the

[5] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium)* Judgment Preliminary Objections and Merits; 14 February 2002 ICJ Reports 2002, 41 ILM 536 (2002), *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgment; 4 June 2008. A further case against France is pending, *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (order refusing request for indication of provisional measures), ICJ provisional measures, 17 June 2003.

[6] *Ex parte Pinochet; R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International Intervening) (No 3)* [2000] 1 AC 147, 119 ILR 135. As an aid to the relevant rule, see the 2001 Vancouver Resolution of the Institut de Droit International on 'The Immunities from jurisdiction and execution of Heads of State and of Government in international law', ADI 69 (2000–2001) 742; it is, however, in some respects out of line with current state practice.

United States apply a separate law to the status of a head of state with some variation dependent on national law or comity. Broadly all States recognize an obligation to ensure due respect towards and the protection, inviolability, and immunity of the head of state when in office, with compliance particularly rigorous on the occasion of an official visit of a head of state to another State. The position of a head of state no longer in office is dealt with in paragraphs **12**.6 and **12**.15 below.

12.5 There can be no head of state without a State and even where there is a State there may be two or more contenders for head of state. These matters are for the national law of the State concerned and for political determination but in the majority of cases there will be no issue as to the State's status as a legal person in international law or the status of its head of state where that office is taken up in accordance with the normal constitutional processes of the country. The process by which a person becomes a head of state, as well as the scope of the powers when in office and the immunity of the head before his own national courts, is solely a matter for determination by the internal law of the State; the head of a monarchy or a republic equally enjoys head of state status in international law as does the Pope, though he does so as the head of the Holy See rather than of a religious community. In modern States the ceremonial and political powers of the head of state may be divided and in consequence a head of government may be accorded the special protection of a head of state in international law; the Institut de Droit International's Vancouver Resolution of 2001 relating to the immunities of a head of state provides that a head of government enjoys the same inviolability and immunity from jurisdiction as a head of state. A regent appointed to exercise the powers of the State temporarily during infancy, incapacity, or some interregnum may also be accorded the position of head of state. The extent to which members of the family of a head of state enjoy immunity is uncertain. As with the family of the head of a diplomatic mission, UK legislation limits the immunities enjoyed to such members of the family as form part of the household of the head of state.[7] Where power is seized contrary to the usual processes, such as in disregard of an election result, it will depend on the circumstances as to whether such a person will be treated solely as a temporary 'strong man' or as a de facto head of state. The situation of General Noriega of Panama, whose claim to immunity as head of state was rejected by the US courts when he was tried on certain criminal charges, is to be contrasted with the UN Security Council's call for the restoration as the head of the State of Haiti of the properly elected President Aristide who had been deposed.[8]

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[7] The State Immunity Act 1978 s 20(1)(b). See Chapter **10** on families of diplomats.

[8] *US v Noriega* 746 F Supp 1506 (Fla 1990), 99 ILR 143, 117 F 3d 1206 (1997), 121 ILR 591; UN Security Council resolution 940 (1994), Haiti, preamble 8, operative para 17.

12.6 A head of state who has been deposed or replaced, abdicated, or resigned is no longer entitled to privileges or immunities as a serving head of state but will be entitled to continuing immunity in regard to acts which he performed while head of state, provided that the acts were performed in his official capacity. Whether this continuing immunity extends to the commission of international crimes is discussed below. An exceptional situation occurred in 1940 at the beginning of the Second World War when a series of dispossessed sovereigns, with their governments, established themselves in Great Britain. They were accorded all the privileges normally due to visiting heads of state and to diplomatic representatives, respectively. The British heads of mission accredited to them continued to function but enjoyed no privileges, except to some small extent, and then only by courtesy, in the matter of minor traffic offences.[9]

12.7 In international law a head of state is deemed to have the capacity to represent, to make treaties, and generally to act for the State. Heads of state, together with heads of government and ministers for foreign affairs are recognized by the Vienna Convention on Treaties 1969, 'in virtue of their functions and without having to produce full powers considered as representing their State . . . for the purposes of performing all acts relating to a treaty', Article 7.2. Thus the International Court of Justice held that Mr Izetbegović as president of Bosnia and Herzegovina had authority to institute proceedings on that State's behalf and the public statements of the president of France that 'this round of atmospheric tests would be the last' were held to be 'in international relations, acts of the State'('représentent dans la domaine des relations internationales, des actes de l'Etat français') and to constitute 'an engagement of the State, having regard to their intention and the circumstances in which they were made'.[10]

Immunity from Criminal Jurisdiction

12.8 Wherever located, a serving head of state enjoys absolute immunity from criminal jurisdiction before the courts of another State: every type of act is covered by this personal immunity from criminal jurisdiction, whether official or personal, committed during office or prior to its assumption, performed in an official

[9] The governments set up their own department in offices which were regarded as extraterritorial, and they were even authorized by the Allied Powers (Maritime Courts) Act of 1941 'to establish and maintain in the United Kingdom courts of justice to be called "Maritime Courts",' and having jurisdiction 'to try persons not being British subjects' for certain specified offences.

[10] *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v Serbia and Montenegro)* (Provisional Measures) Order 8 April 1993, para 13; (Preliminary Objections) 11 July 1996, ICJ Reports 1996, 4 at 31, para 44; *Nuclear Test Case Australia/France New Zealand/France* ICJ Reports 1974, 253, at 247.

capacity or a private capacity, when present in the territory of another State or outside 'if a mere risk . . . by travelling or exposing . . . to legal proceedings could deter from travelling internationally when required to do so for the purposes of the performance of official functions'.[11] Thus, the French Court of Cassation overruled a lower court and held Colonel Ghadaffi, as the serving head of state of the Libyan Arab Jamahiriya, immune in respect of alleged complicity in acts of terrorism leading to murder and the destruction on 19 September 1999 of a civilian aircraft over the desert.[12]

Official Visits in the Territory of Another State

12.9 When present in a State's territory on an official visit, the protection of heads of state covers their persons, the premises in which they reside, their personal baggage and other accompanying property, and the means of transport used in coming into and leaving the State and travelling within it; inviolability means that the police or other officials of the visited State may not enter the premises or detain or inspect the property without the consent of the head of state nor arrest nor detain the head against his or her will.

Immunity from Civil and Administrative Jurisdiction

12.10 A head of state enjoys absolute immunity from the exercise of civil and administrative jurisdiction of the courts of another State in respect of acts performed in a *public* capacity in the course of official functions. State practice regarding a serving head of state's *personal* immunity from administrative and civil jurisdiction of the courts of another State is less certain: 'State practice is uneven. Where legal proceedings have been instituted against foreign heads of states in respect of their personal conduct, the resulting judicial decisions have not been consistent.'[13] A bar is generally recognized on civil proceedings against a head in the courts of a State during the period of an official visit to that State. But no immunity will apply in respect of a counterclaim relating to proceedings initiated by the head of state and civil proceedings in respect of private unpaid debts of a head of state or relating to private premises or property may be allowed in some foreign courts, subject always to nothing being done in respect of such proceedings where the

[11] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium)* above n 5, para 55.

[12] *In re Ghadaffi, SOS Attentat and Castelnau d'Esnault v Ghadafi, Head of the State of Libya,* France, Court of Cassation, crim chamber. No. 00-87.21513 March 2000, 125 ILR 490.

[13] A Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments, Foreign Ministers' (1994) 247 *HR* (994-III) 64.

head of state is present in the territory of that State in exercise of official functions.[14]

The Obligation of Due Respect

12.11 A serving head of state is also to be treated with all due respect: here a balance is required to be struck between the respect due to the head of state and the interests of justice and the rights of individuals. Presence in the territory of another State may require closer observance of the duty; thus the citizen's right to freedom of expression was held to be no defence to prosecution for a scurrilous attack on a foreign visiting head of state in the local press and the International Court has indicated that the sending of an email inviting a head of state to give evidence, and setting, without consultation, an extremely short deadline to appear in a judge's office, constitutes a failure 'to act in accordance with the courtesies due to a foreign head of state'.[15] Where an act of disrespect is alleged when the head of state is not personally present in the receiving State, the observance of respect may be less demanding and a distinction may be drawn between offensive conduct by an official representative of the State and conduct by a private party. In proceedings before the English court between a former wife and a fortune teller, directions were sought by the Sultan of Brunei to anonymize all reference to the intimacies of his married life on the basis that, as a serving head of state, he was entitled under UK law—SIA, s 20—to the same inviolability as an ambassador, and consequently, by virtue of the Vienna Convention on Diplomatic Relations 1961, Article 29, the UK (including its courts) was required to 'treat him with due respect . . . and take all appropriate steps to prevent any attack on his dignity'. The English court held there to be 'no supervening right in a foreign sovereign to complete protection irrespective of the interests of justice; but the courts will do all that can be done consonantly with the interests of justice

[14] Article 3 of the 2001 Vancouver Resolution of the Institut de Droit International on 'The Immunities from jurisdiction and execution of Heads of State and of Government in international law' provides:

'In civil and administrative matters, the Head of State does not enjoy any immunity from jurisdiction before the courts of a foreign State, unless the suit relates to the acts performed in the exercise of his or her official functions. Even in such cases, the Head of State shall enjoy no immunity in respect of a counterclaim. Nonetheless, nothing shall be done by way of court proceedings with regard to the Head of State while he or she is in the territory of that State, in the exercise of official functions.'

[15] *JAM v Public Prosecutor*, Netherlands Supreme Court, 21 January 1969, *YBIL* (1970) 222.73 ILR 387; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment of 4 June 2008, paras 170–3.

to protect any third party, a foreign sovereign included, from the fallout of other people's litigation'.[16]

Immunity from Execution

12.12 The law of state immunity affords a general bar to the forcible seizure, attachment, or sale by national authorities of the property of the State, and property owned by the State in use by the head of state will clearly be immune from enforcement. Private property of the head of state located in another State may not be immune from execution in pursuance of a valid judgment given against him but no such enforcement is to take place whilst the head of state is in the territory where such execution is to be carried out.

Taxation and Other Privileges

12.13 A visiting head of state is entitled to exemption from national and local taxation though not necessarily in respect of private immovable property owned by him or income from private activities. If the foreign sovereign engages in a trading venture or in speculative investment, it may be justifiable to subject the head to civil suit or to deny tax exemption on the profits. But state practice in regard to the taxation of the personal investments of foreign heads of state is in fact very varied. Other privileges of a ceremonial nature derive more from comity and goodwill between the two countries than strict law.

Respect for Local Law

12.14 The enjoyment of personal immunity does not authorize the head of state to disregard the local law; like an ambassador, a head of state when visiting another country is under a duty to respect the local laws and regulations. Whilst with modern communications the head may continue while in another country to carry on the internal administration of the home government, he or she should

[16] *Aziz v Aziz & Sultan of Brunei* [2007] EWCA Civ 712 (11 July 2007), per Sedley LJ at para 132a. Lord Justice Lawrence Collins, at para 90, in considering whether the obligation on states to prevent offensive conduct by private individuals against foreign heads of state is 'rather more a matter of etiquette or comity than of law', cited Stowell 'Courtesy to our Neighbours' (1942) 36 *AJIL* 99, in which the US Secretary of State, Cordell Hull, is reported as making an apology to Japan in 1935 for a cartoon of the Mikado published in Vanity Fair, and President Roosevelt an apology in 1941 to Chile for a reference to the President of Chile 'as spending more and more time with the red wine he cultivates'. Cf, Chapter **9**, paragraph **9**.7.

refrain from acts with damaging consequences for the internal affairs or international relations of the country visited.

Immunity of a Former Head of State

12.15 Personal immunity ceases when a head of state is no longer, for whatever reason, in office. However, the general practice is to accept, as with the diplomat as provided in Article 39.2 of the 1961 Vienna Convention on Diplomatic Relations, that functional immunity *ratione materiae* continues on vacation of office by the head of state in respect of acts performed in the course of official functions. The UK and Australian legislation expressly so provides by applying directly to the head of state the provisions of the Vienna Convention on Diplomatic Relations 1961.[17]

12.16 It has been suggested that a former head of state should enjoy no such functional immunity from criminal prosecution for the commission of international crimes, such as genocide, or war crimes. One approach is to treat such acts as outside the official competence of a head of state and hence to treat them as private acts enjoying no immunity. Another is to apply the rule now pertaining in international criminal tribunals whereby the official status of an individual as head of state or other official of the State is no defence to prosecution for an international crime in those tribunals; in consequence either by universally binding resolution of the UN Security Council or by treaty to which the State whose head is prosecuted is a party, no immunity is enjoyed before these tribunals by a head of state, whether serving or out of office.[18] The Statute of the International Criminal Court (ICC), which in general only binds parties to the Rome Statute, expressly states that not only is the office of a head of state no defence but the 'immunities which may attach to the official capacity of a person . . . shall not bar the [ICC] from exercising its jurisdiction over such persons' (Article 27.1 and 2). Within national courts it has been argued that the same rule of removal of immunity should apply so as to permit the criminal prosecution of one who is proved to have committed an international crime. The English courts at the highest level declared immunity to be no bar to the extradition of General Pinochet, a former head of the State of Chile, on a charge of torture, a crime which by the 1974 UN Convention the relevant States had undertaken to prosecute. This ruling, which has been widely quoted (including by the International Court of Justice),

[17] Given the force of law in the UK by the Diplomatic Relations Act 1964.

[18] *Milosevic*, ICTY decision on Preliminary Motions, Trial Chamber III, Case No.IT-02-54, Decision of 8 November 2001; *Prosecutor v Charles Taylor*, decision of Sierra Leone, Special Court, Appeals Chamber, Case SCSL-2003-01-I, 128 ILR 239.

provides support for the removal of immunity where States are placed under an obligation, either by a binding Security Council resolution or by treaty, to prosecute a person who might otherwise enjoy immunity in their national courts. Whilst these lines of argument may well signal a future change in the law,[19] it is submitted that, as a matter of international law, the present position is that the functional immunity of a head of state survives after vacating office for all acts performed in the course of official functions including the commission of international crimes.

12.17 The special status, as set out above, which the head of state enjoys remains a matter very dependent on the practice of States. Until codified there will inevitably be differences and doubt as to the precise treatment required to be given by one State to the serving head of another State. One area of uncertainty is the extent to which ministers of central government may claim similar personal immunities to those of a serving head of state. As stated, there is general acceptance that the head of government enjoys protection and immunities similar to a head of state.

The Minister for Foreign Affairs

12.18 Similar protection and immunities have now been recognised by the International Court of Justice as regards a serving minister for foreign affairs of a State. The International Court of Justice noted three characteristics that entitled the minister for foreign affairs of a State to special protection in international law: responsibility for the conduct of the government of the State's diplomatic activities; representation of that government on interstate negotiations and at intergovernmental meetings—there being a presumption simply by virtue of the office of Full Powers to act on behalf of the State without letters of credence (Vienna Convention on Treaties Article 7.2(a)); and an ability to travel internationally freely and without hindrance on government business. Declaring that: 'a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognised under international law as representative of the State solely by virtue of his or her office', the Court held Belgium to be in breach of international law by the mere circulation of the warrant against the serving foreign minister of the Republic of Congo, even though no action was

[19] On 19 February 2009 Belgium filed an application to the ICJ against Senegal for breach of its international obligation to prosecute in its own courts or to extradite to Belgium for criminal prosecution M. Habre, until 1992 president of Chad, for acts including crimes of torture and crimes against humanity. ICJ Press Release 19 February 2009.

taken by any other State and no Red Notice was issued by Interpol at the relevant time consequent on such circulation.[20]

Other Ministers of the Central Government of a State

12.19 The conduct of government business with other States is no longer confined to the minister of foreign affairs; as the International Court has noted '. . . with increasing frequency in modern times other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations and even of certain officials.'[21]

The criteria for immunities of other ministers

12.20 The criteria for extension of the personal immunity of the head of state to ministers of central government other than the minister for foreign affairs remains uncertain, though the International Court has indicated that Djibouti's minister responsible for internal national security would not so benefit. On the basis of the present authorities, it is suggested that any extension of such personal status to ministers other than the minister for foreign affairs would depend on whether: (1) the exercise of the official's powers extended abroad; (2) immunity was indispensable for carrying out such functions; and (3) he or she was authorized to represent the State as to its position in foreign relations, including responsibility for matters which occurred outside the State's territory. It should not, however, be overlooked that in any event state immunity may provide some protection to such a high-ranking state official; any minister, as in the case of any state official, enjoys functional immunity in respect of acts which he performs on behalf and in the name of the State.

12.21 In conclusion it should be stressed that the present protected position of a head of state remains largely dependent on customary international law which by its general unwritten character may well be subject to change.

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[20] *The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* Judgment of 14 February 2002, para 70; Cassese (2002) 13 *EJIL* 853. See further Chapter **2**.

[21] *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo/Rwanda)* ICJ Jurisdiction and Admissibility of the Claim, 3 February 2006, para 47.

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13

SPECIAL MISSIONS

The New York Convention on Special Missions	13.4
Customary International Law	13.12

13.1 The earliest diplomatic missions in Asia and Africa as well as in Europe were generally temporary diplomatic missions despatched for a particular purpose. It was only in the sixteenth century that the major States in Europe began to maintain permanent diplomatic representation abroad, and it is clear from diplomatic writings of this period that permanent and temporary ambassadors coexisted in a capital without its being thought that the distinction in the duration of their missions implied any difference in their status. But gradually permanent diplomatic missions became the norm. Special missions were on the whole used only at a very high level and for ceremonial occasions. A royal wedding or funeral, or the signing of a peace treaty would be the occasion for a gathering of heads of state or their very distinguished representatives. Routine business on the other hand was almost always conducted through permanent ambassadors.

13.2 However, throughout the last century the sending and receiving of representatives on short-term missions has become more frequent. It is not only that heads of state, prime ministers, and ministers of all kinds visit their opposite numbers with a frequency that was unthinkable before the development of fast and regular international air travel. Business exchanges at the ordinary diplomatic and at the technical level between government servants are steadily increasing. Speed of travel makes it easier to send the expert in a particular subject for negotiations. The complexity of much intergovernmental business makes it preferable to send that expert rather than to give the diplomatic mission complicated instructions which they do not have the expertise to handle with confidence. The very large growth in the number of sovereign States entitled to send diplomatic representatives, but unable to bear the cost of many permanent missions abroad, and the need for economy in their overseas representation, even among the richer States,

means that often a special mission is essential for some particular business simply because the sending and receiving States have no permanent missions or even other States protecting their interests in each other's capitals.

13.3 The status of these various representatives was, however, far from clear. Heads of state enjoyed extensive privileges and immunities as foreign sovereigns. Some States regarded other temporary representatives as entitled to the same privileges and immunities as permanent diplomatic agents. It was generally accepted that more junior special representatives enjoyed certain immunities, such as immunity for their official acts and inviolability for their official papers and documents, by virtue of their status as agents of a foreign sovereign. Customs facilities would usually be extended to them as a matter of courtesy on production of a diplomatic passport. They did not, in general, stay long enough for serious questions to arise in regard to their tax liabilities or to become involved in civil law disputes. The extent of their privileges and immunities therefore remained obscure in most countries, but this seldom gave rise to any practical difficulties. Where the sending State had a permanent mission in the receiving State and it was regarded as important that a special envoy should be protected by diplomatic status, it was always possible to accredit him for a short period as a member of the permanent mission.

The New York Convention on Special Missions

13.4 The Vienna Conference of 1961 set on one side the question of special diplomatic missions so that a more thorough study might be made of their special requirements. The Vienna Convention on Diplomatic Relations therefore relates only to permanent diplomatic missions. Draft articles were subsequently prepared by a Special Rapporteur and discussed by the International Law Commission. In 1968 and again in 1969 the International Law Commission's draft was discussed by the Sixth Committee (the Legal Committee) of the General Assembly of the United Nations, and a Convention on Special Missions (usually known as the New York Convention on Special Missions) was adopted by the General Assembly on 8 December 1969.[1] The Convention, which followed closely the proposals of the International Law Commission, very broadly gives to special missions and their members the same privileges and immunities, with appropriate adjustments, as are accorded to permanent diplomatic missions under the Vienna Convention of 1961. Support for the Convention has, however, been limited. It did not enter into force until 1985, and nearly 40 years after it was opened for signature only 38 States are parties. The parties do not include

[1] UN Treaty Series vol 1400, 231; Cmnd 4300.

the US, the UK, or other major European States with the exception of Switzerland, Austria, and Poland.

13.5 A substantial number of countries, mainly Western European, have always had difficulty in accepting that all special missions should be given full diplomatic privileges and immunities. These countries already had very substantial numbers of diplomatic missions and privileged persons in their capitals, and they were very conscious of the administrative difficulties of extending inviolability to the hotel suites of transient missions, or of extending tax and customs privileges to the multiplicity of foreign officials who came and went on government business of some sort. They were prepared to guarantee diplomatic status to high-level missions headed by a head of state, head of government, minister, or senior official, but more routine missions should, they believed, be content with the immunities to which their character as emissaries of a sovereign State entitled them, together with a lower level of privilege which could be defended on grounds of functional need. But the majority of countries did not accept this approach. They felt that great weight must be given to the views of the International Law Commission. The smaller countries felt that they were much more likely than the European countries to send a special mission to a capital where they had no permanent diplomatic mission, with its additional possibilities of protection, and that to a certain extent special missions were the typical form of diplomacy for the poorer countries. To give their ad hoc representatives an inferior status to the permanent ambassadors of the richer countries would thus amount to discrimination against them, and in the political context of the General Assembly where the Convention text was finalized the force of this argument was accepted by the majority of UN Member States.

13.6 Article 1 of the New York Convention defines a 'special mission' as 'a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task'. 'Temporary' distinguishes special missions from permanent diplomatic missions. 'Representing the State' distinguishes the special mission from a parliamentary delegation, a football team, or a visiting orchestra carrying out a cultural exchange, since, whatever their sponsorship, they are not emissaries authorized to speak for the State, even when the State may assist in financing them. 'Specific questions' or 'a specific task' define the purpose of a special mission. Most important, however, in the definition is the requirement that a special mission must be sent with the consent of the receiving State. This is again emphasized in Article 2 which provides that '[a] State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel'. It is this requirement of prior consent which gives the receiving State

the control over its reception of special missions which is essential if it is to be able effectively to discharge the heavy obligations in regard to privileges and immunities which are imposed by the Convention. Even among parties to the Convention, most routine visits of experts or official negotiators are not given the status of special mission. Each receiving State may decide for itself how generous or restrictive it will be in acceding to requests to receive delegations in the capacity of special missions, and what criteria it will apply. It is clear, however, that the intention of the Convention is that only missions whose functions are essentially diplomatic in character are to be regarded as special missions. During the negotiation of the Convention in the Sixth Committee the United Kingdom gave this explanation:

> A special mission is a temporary, *ad hoc* mission. The existence of a particular special mission derives from an *ad hoc* expression of mutual consent by the sending and receiving States. A special mission represents the sending State in the same sense of the word 'represents' as a permanent diplomatic mission represents the sending State. It represents the sending State in the external, international sense, in an aspect or aspects of its international relations. The normal task which a special mission will perform is a task which would ordinarily be performed by a permanent diplomatic mission of the sending State if one exists in the receiving State or if it had not been decided on the particular occasion that an *ad hoc* mission was called for. When you have said these things, you have in our view said all that needs to be said to identifying the nature of a special mission for the purposes of the Convention.

13.7 The rules regarding the formation, composition, and functioning of special missions in general follow those established for permanent diplomatic missions by the Vienna Convention. But two provisions may be singled out which have no parallel in the Vienna Convention and illustrate the uses to which the device of a special mission can be put. Article 6 provides that two or more States may each send a special mission at the same time to another State, with the consent of that State, in order to deal together with a question of common interest to all of them. Article 18 provides that special missions from two or more States may meet in the territory of a third State if they first obtain the express consent of that third State, which may withdraw its consent at any time, may impose conditions, and limit the extent to which it assumes the obligations of a receiving State.

13.8 The privileges and immunities accorded to special missions and their members, as has been pointed out, follow closely those accorded to permanent diplomatic missions by the Vienna Convention. A few differences, however, some deriving from the different nature of special missions and some from reconsideration of the terms of the Vienna Convention, may be pointed out. Article 21 makes special provision for visiting heads of state, by requiring that when a head of state leads a special mission he 'shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of

State on an official visit'. The same Article also provides that '[t]he Head of the Government, the Minister of Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State, or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law'. However, it cannot be regarded as at all certain what, if any, additional privileges and immunities are required by international law to be given to visiting heads of government or ministers. Some States may equate a head of government with a head of state, but ministers have never been regarded under customary law as generally entitled to sovereign immunities. The privileges and immunities of heads of state and ministers have already been described more generally in Chapter **12** above.

13.9 Article 24 limits tax exemption for special mission premises by the words 'To the extent compatible with the nature and duration of the functions performed by the special mission'—this allows the receiving State to claim that a mission which overstays its welcome loses its tax exemption, and relieves it from an obligation to grant exemption or repay minimal amounts of tax. Article 25 gives inviolability to the premises of special missions, but has regard to the fact that such premises will often be in hotels by providing a power to assume consent of the head of mission to entry where there is a fire or other disaster and he cannot be contacted—a power which does not exist in the case of permanent embassies. To the inviolability of archives set out in Article 26 it is added, to assist the receiving State, that these archives should, when necessary, bear visible external marks of identification. The right of freedom of movement, under Article 27, is limited to what is 'necessary for the performance of the functions of the special mission'. Rights of free communication similar to those of permanent missions are given under Article 28, but it is added that '[w]here practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State'.

13.10 The personal immunity given to members of a special mission is more limited than that of a diplomat in that to the exceptions to immunity there is added 'an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned'. This reflects the resentment of immunity in regard to motor accident claims which is expressed by the public in all capitals where there are substantial numbers of persons entitled to diplomatic immunity. Immunities and privileges are extended to subordinate staff and to nationals and permanent residents of the receiving State to the same extent as under the Vienna Convention, but members of families receive privileges and immunities on the Vienna scale only if they accompany members of the special mission and provided that they are not nationals or permanent residents of the

receiving State. The problem of determining who is a 'member of the family forming part of the household' in the context of permanent diplomatic agents does not arise in the case of special missions.

13.11 The same obligations as under the Vienna Convention are laid on transit States in regard to members of special missions. But in this case the obligations arise only where the transit State has been informed in advance, either in the visa application or by notification, of the transit of the persons concerned as members of the special mission, members of their families, or couriers, and has raised no objection to it. This emphasizes that, as in the case of members of diplomatic missions, there is no right of passage through a third State and that the third State must consent to the transit before being required to accord any special privileges to members of special missions.

Customary International Law

13.12 The relatively small number of parties to the New York Convention, together with the fact that even among parties a specific agreement to apply the Convention to a routine special mission is seldom concluded means that the Convention, unlike the Vienna Convention on Diplomatic Relations, has not acquired the status of customary international law.[2] Except for visits of heads of state and foreign ministers—discussed in Chapter 12 above—general practice has continued on the lines set out in paragraph **13**.3 above. The overwhelming majority of States are in diplomatic relations with one another and where they have no permanent mission in another State they use a third State to protect their interests. A routine special mission will make use of the cover and facilities of the protecting State to ease progress through customs and immigration on arrival, to hold sensitive briefing meetings, store confidential papers, and dispatch and receive communications. Where the mission lasts more than a few days or the situation in the receiving State is volatile or hostile, visiting negotiators may be appointed as diplomats either to their own embassy if there is one or within a special interests section of the mission of their protecting State. Provided that the business of the special mission in the receiving State is diplomatic in character, no objection is normally taken to such short-term appointments. In the United States, not a party to the Convention on Special Missions, the State Department was notified by Saudi Arabia of the appointment as 'special envoy' of a member of the Saudi royal family, Prince Turki Bin Abdulaziz. Information was received that he was holding a woman (an Egyptian nanny) against her will

[2] This was confirmed by a German court in the case of *Tabatabai,* 80 ILR 389.

in his Florida residence, and in the belief that he was not entitled to immunity, the police attempted to execute a search warrant. There was forcible resistance by the Prince and members of his family involving, according to one account, spitting and the throwing of a chair.[3] The Prince sued the police for violation of his civil rights and they counterclaimed for injuries received. The State Department then certified that his appointment entitled him to diplomatic immunity, this was accepted by the court, and claim and counterclaim were both dismissed.[4] By contrast, the State Department informed a Florida judge in a later case that a national of Mali acting as 'Special Advisor' to a special mission of The Gambia in the United States had not been given any diplomatic status and was therefore not immune from charges of illegal export of helicopters and bribery of a US customs agent. This decision was accepted as conclusive by the US District Court in 1997.[5]

[3] C R Ashman and P Trescott, *Outrage* (WH Allen, 1986) 148–52.
[4] *Abdulaziz v Metropolitan Dade County and Others*, 741 F 2nd 1328 (1984); 99 ILR 113.
[5] *US v Sissoko*, 995 F Supp 1469 (1997); 121 ILR 600.

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Book IV

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14

THE DIPLOMATIC CORPS

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14.1 The diplomatic body (*corps diplomatique*) comprises the heads and the diplomatic staff of all the missions accredited to a particular receiving State. The term has also been used to denote only the heads of diplomatic missions, though the wider sense of the term is more usual. The *corps diplomatique* has no legal personality or formal constitution. In most major capitals a diplomatic list, based on the notifications of appointments, arrivals, and departures required from missions under Article 10 of the Vienna Convention on Diplomatic Relations, is published by the ministry of foreign affairs. The list may also include spouses and members of the families of heads of mission and diplomatic staff. As already explained in Chapter 7 above, inclusion on the diplomatic list is mainly for protocol and social purposes and is not conclusive evidence of entitlement to privileges and immunities. Where one or more international organizations have their headquarters in a capital there may be additional diplomatic bodies consisting of the permanent representatives to each organization—for example in Brussels there are in addition to the body of ambassadors accredited to the King of Belgium the body of ambassadors to the European Union and that of ambassadors to NATO.

14.2 The most senior ambassador is the dean or doyen of the diplomatic corps. In most States this seniority is determined by date of arrival. In some capitals however, particularly in the case of Roman Catholic countries, the representative of the Holy See is automatically accorded the status of dean, and this practice is permitted, though not required by the Vienna Convention on Diplomatic Relations. Formerly the Holy See sent a nuncio as the head of its mission only

where this automatic precedence was accorded by the practice of the receiving State. In 1994 however this practice was discontinued for new appointments and the Holy See now sends a nuncio without regard to whether he is automatically given the status of dean. There have in the past been difficulties over the acceptance as dean of the ambassador of a State whose relations with the receiving State were strained, but given the limited and essentially non-political functions of the dean, such difficulties now appear to be very rare.

14.3 The dean is responsible for representing and defending the collective interests of the diplomatic corps in matters of ceremony and protocol, facilities, privileges, and immunities. He acts as spokesman for his colleagues on public occasions. He will present the views of the diplomatic corps in the event of failure by the government of the receiving State to provide appropriate inviolability, immunities, and privileges. The dean acts as spokesman on the basis of informal consultation with colleagues and is not expected to become involved in political questions. For the receiving State he is the main channel of communication with heads of mission and may be asked to circulate informal information or guidance. The modern practice however is for the Protocol Department of the ministry of foreign affairs to send circular Notes or letters to all embassies on formal matters such as new legislation of particular relevance to diplomatic missions or administrative procedures on such matters as customs clearance or immigration privileges. These circular Notes may be published in national Digests of international law practice, and in the case of the US State Department they are also published on the Internet.[1] There may be informal communication by the government through the dean if there is concern about abuse of privileges such as duty-free import entitlements, abuse of immunities by frequent disregard of parking restrictions, or disregard by diplomats of their duty not to interfere in the internal affairs of the receiving State.[2] But under modern practice problems of abuse are more usually handled by way of representations to particular embassies, sometimes backed up by the threat of sanctions, rather than by complaint to the entire diplomatic corps. There have also been a few examples of representations made to the corps on political matters—for example in 1944 Marshal Pétain summoned the entire corps to protest at his deportation to Germany[3]—but these exceptional events do not reflect modern practice.

14.4 Where difficulties are political rather than administrative in character, collective representations may be made by heads of missions representing political

[1] At <http://www.state.gov/ofm/31311.htm>.

[2] For example, in 1969 General Mobutu summoned the dean of the diplomatic corps to protest about interference in the internal affairs of the Democratic Republic of the Congo.

[3] J A Salmon, *Manuel de Droit Diplomatique* (1994) para 130.

groupings—which may be groups of which a State particularly affected is a member or groups with a particular interest in the outcome. Collective representations by the ambassadors of European Union Member States, for example, are now very common where a European Union State has grounds for complaint or where the European Union takes the view that it may be able to make effective use of incentives at its disposal such as aid or trading preferences, and this will be further described in Chapter 27 below. Representations may also be made by one of the United Nations political groups such as the Western European and Others Group or by the Commonwealth. States will take part in such political representations only on the basis of specific authorization from their sending government. The dean of the diplomatic corps will not normally become involved in these representations and even if his own State is a part of the relevant grouping he may decline to participate if he takes the view that it could prejudice his neutral status as dean.

14.5 Because of the neutral status of the dean, he may when acting in that capacity have dealings with the representatives of States which his own sending State does not recognize or with which it does not have diplomatic relations. These dealings will not carry legal or political implications.

14.6 Because the dean is usually qualified by virtue of long diplomatic experience in the relevant capital he may be consulted on an informal basis by his colleagues on matters of local protocol and usage, though this does not form part of his official duties. The same advisory function may be carried out by the wife of the dean—known as the doyenne—to wives of diplomatic colleagues. Where the papal nuncio is dean, the wife of the next most senior ambassador will act as doyenne.

Communication in the Absence of Diplomatic Relations

14.7 Chapter **6** above explained the relevance of recognition and the existence of diplomatic relations between sending and receiving States to the sending of permanent diplomatic missions. As between embassies and diplomats in the same receiving State, relations between their sending States may also limit the contacts which they maintain. The representative of a State which does not recognize another or does not recognize its government may not communicate with the representative of the unrecognized entity and may not formally acknowledge a communication received from it, since under such circumstances either communication or acknowledgement of a communication may be evidence of implied recognition. A communication received by a mission may be retained without acknowledgement (for example when it is expected that recognition will

shortly be forthcoming) or may be returned to the sending mission. If communication is for some reason essential it may be effected through the ministry of foreign affairs of the receiving State or through another embassy which does recognize the sending mission.

14.8 Where there are no diplomatic relations between the two sending States the rules are somewhat less rigorous, since diplomatic relations cannot be established by implication or inadvertence. As explained in Chapter **6**, States which recognize one another almost always establish diplomatic relations even without setting up permanent missions, so absence of relations is much more likely to result from a deliberate breach by one State. The constraints on contact in such cases are political, and in many cases the sending State will issue instructions to its representatives abroad, either by way of general guidance or with particular reference to the individual State or States. There are no rigid bars on informal, private, or secret contacts—which sometimes occur in the context of efforts at mediation. Humanitarian considerations may be overriding—even as between representatives of States at war. Callières relates the story of Sieur de Grenonville, French representative at Rome during hostilities between France and Spain, who, learning of a plot to kill the Spanish ambassador, warned the intended victim and earned much praise for his action.[4]

National Days

14.9 On the date chosen for the celebration of its National Day, it is customary for the head of each diplomatic mission to receive the congratulations of representatives of the host government and of the heads of all other diplomatic missions accredited in that capital. Usual practice is for the head of the celebrating mission to give a reception—usually in the embassy or in the residence of the ambassador—at which these congratulations may be offered. All heads of mission invited are expected to attend and if his personal absence is unavoidable, a head of mission must send an explanation with regrets, and ensure that he is represented by the most senior member of his diplomatic staff. At most embassies a visitors' book is kept in the entrance hall and is open for signature by all who call on the head of mission—whether on business, for expressing thanks, congratulations, or condolences, or on a courtesy call on first arrival or departure from the receiving State. Heads of mission will normally sign the visitors' book on attending a National Day and this gesture of goodwill is sufficient to make it unnecessary to send an individual letter of thanks later.

[4] F de Callières, *De la manière de négocier avec les souverains* (Paris and Amsterdam,1746).

Flags

14.10 Article 20 of the Vienna Convention on Diplomatic Relations states that a diplomatic mission and its head have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of mission and on his means of transport. The right is under the Convention unlimited, but there may be local practices limiting the flying of the flag on the chancery building to special occasions—which would include as a minimum the National Day and principal public festivals of the sending State and the National Day and the birthday or accession anniversary of the head of state of the receiving State. If these practices take the form of local laws or regulations, diplomats are required to respect them under Article 41 of the Vienna Convention—provided of course that they do not fundamentally undermine the basic right of the embassy to display its flag and emblem. The flag is customarily flown at half mast on the death of the head of the sending State and on the death of the head of the receiving State and may be flown at half mast in the event of some other tragedy or disaster in the sending or the receiving State.

14.11 The symbolic character of the flag implies a particularly high duty on the authorities of the receiving State to protect it from insult or damage, since such attacks would obviously infringe the dignity of the sending State. At the same time the flag and emblem present a particularly attractive target for political demonstrators. In 1968, for example, North Vietnamese students in protest at the war in Vietnam tore down the flag and shield from the United States embassy in Prague. Although later on that same day Czech students returned the shield together with a new flag to the Embassy, with apologies for the conduct of their fellow students, the US nevertheless made a formal protest and received an apology from the Czech government.[5]

14.12 The privilege of flying the flag on means of transport is limited to the personal conveyance of the head of mission. It does not extend to public conveyances used by the head of mission or to the means of transport of the mission, and an acting head of mission or chargé d'affaires *ad interim* should probably fly the flag only when making an official call. The use of the privilege is now often limited by considerations of security which mean that anonymity of the ambassador's car is more important than visible signs of his status which might identify him as a target.

[5] (1969) *RGDIP* 177.

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15

PERSONA NON GRATA, BREACH OF RELATIONS, AND OTHER ENDINGS TO APPOINTMENTS AND MISSIONS

Recall	15.2	**Breach of Diplomatic Relations**	15.19
Death of a Head of Mission or other Member of the Mission	15.3	**Disappearance of the Head of the Sending or the Receiving State**	15.22
Persona Non Grata	15.6	**Facilities for Departure**	15.29
Withdrawal of a Diplomatic Mission	15.17		

15.1 The mission of a diplomatic agent may be brought to an end in any one of the following ways:

(i) his recall by the sending State or termination of his appointment at the end of the period for which he was posted, or on completion of the task for which he was sent;

(ii) in the case of a chargé d'affaires *ad interim,* on the return or arrival of the permanent head of mission;

(iii) the ending of the appointment of the head or a member of a special mission on the conclusion of the task for which the mission was appointed. Examples might include a royal wedding or a funeral of a head of state, or special negotiations between the sending and receiving States.
Special missions may come to an end in other ways, as is made clear by Article 20 of the New York Convention on Special Missions,[1] and formal recall of a special mission is not necessary;

(iv) on the death of the diplomatic agent;

[1] See Chapter **13** above.

(v) where the receiving State asks for the recall of the diplomat or formally notifies the sending State that he is *persona non grata*;
(vi) where the sending State recalls the diplomatic mission, whether on a temporary or on an indefinite basis;
(vii) where diplomatic relations are broken off between sending and receiving States; and
(viii) on the disappearance of the sending or the receiving head of state.

Recall

15.2 The first of these is of course the most usual. A diplomat may be recalled for the purpose of a further appointment in his home State or elsewhere, on his retirement from his own service, or on his resignation being accepted by his own government. Although his functions as representative of his State come to an end with the notification by the sending to the receiving State—as is made clear by Article 43 of the Vienna Convention on Diplomatic Relations—the diplomat is entitled to personal privileges and immunities by virtue of Article 39 of the Convention until he leaves the receiving State or has had a reasonable period in which to do so, as described more fully in Chapter **9** above. An ambassador who is about to leave his post for any of the above reasons may ask for a farewell audience with the head of state, at which he may present his letters of recall if he has received them. This audience is usually private. It is now more usual for an arriving ambassador to present the letters of recall of his predecessor together with his own letters of credence. When about to leave his post, whether temporarily or finally, the head of mission should write to the appropriate official in the ministry of foreign affairs (in London, the Vice-Marshal of the Diplomatic Corps) giving the exact date of his departure and nominating a chargé d'affaires *ad interim.* This letter is signed by the head of mission personally. Under Article 19 of the Vienna Convention on Diplomatic Relations, the appointment of a chargé d'affaires *ad interim* cannot properly be made after the departure of the head of mission except by the ministry of foreign affairs of the sending State. Notification of the departure of other members of the mission and their families is also required by Article 10 of the Vienna Convention, but this is normally done through the protocol department of the ministry of foreign affairs and no special formalities are prescribed.

Death of a Head of Mission or other Member of the Mission

15.3 On the death of the head of a diplomatic mission, it will be necessary for the sending State to notify the receiving State of the name of a chargé d'affaires

ad interim, if one has not been previously appointed. If the death takes place in circumstances where ordinarily an inquest would be held, the authorities in the receiving State should if necessary be reminded that it has been general international practice[2] not to hold an inquest where a diplomatic agent or other member of a mission dies in office, whether in inviolable premises or not. This practice may be based on the continuing immunity from jurisdiction and inviolability now reflected in Article 39 of the Vienna Convention on Diplomatic Relations. The sending State may waive immunity and allow an inquest to take place, although this would be highly unusual. The privileges and immunities applicable to family members and to property in the event of the death of a member of a mission are described in Chapter **9**, paragraphs **9**.31 and **9**.40 above.

15.4 If the mission terminates by the death of an ambassador at his post, the receiving State may wish to mark the occasion by some ceremonial mark of respect to him in view of his representative character. The nature of such a ceremony would be for agreement between the sending and receiving States as well as the ambassador's own family. Alternatively a memorial service or a similar ceremony of honour and respect to the deceased ambassador might be arranged. If it is desired that the body of the ambassador should be returned for burial in his own country, the receiving State may offer to arrange the conveyance of the body on a warship or state aircraft to his own country, or a state procession from the embassy to mark the first stage of a journey by sea or air. On the death of the Netherlands Ambassador in London in 1952 a ceremonial procession was arranged in his honour from the embassy in Portman Square to Knightsbridge Barracks, where there was a guard of honour and the coffin was transferred from a gun carriage to a motor hearse for conveyance to the airport. In 1958 full military honours were also accorded when the body of the Iranian Ambassador was taken from the embassy to Northolt Airport and was conveyed by Royal Air Force Transport Command to Tehran. At the funeral in Tehran the Queen was represented by her ambassador in Iran.[3] In 1976, on the murder of Señor Fernando Rodríguez Olivia, the Peruvian ambassador to Jamaica, his body was flown to Lima, accompanied by the Jamaican ambassador to Peru and members of the Jamaican Defence Force. A requiem mass for the Ambassador was said at a church in Kingston and was attended by the prime minister of Jamaica and members of his Cabinet.[4] On the sudden death of the Czech ambassador to the UK in 2009, his body was flown from Northolt Airport to Prague for his funeral, and the Marshal

[2] See Chapter **9**, paragraph **9**.22 above.
[3] *The Times,* 8 May 1958.
[4] *The Times,* 17 June 1976.

of the Diplomatic Corps in London attended the airport on behalf of the Queen as a mark of respect.[5]

15.5 In place of the farewell audience it is practice that the head of state of the receiving State should convey his sympathy to the acting head of mission and the family of the deceased ambassador and should be represented at any funeral or memorial service. In London, the Marshal of the Diplomatic Corps calls on the acting head of mission to convey the Queen's sympathy. The Queen is represented, normally by the Marshal of the Diplomatic Corps, at the funeral or memorial service in the United Kingdom and by her ambassador at the funeral or memorial service in the home country of the deceased ambassador. The Marshal of the Diplomatic Corps attends the departure of the body from London.

Persona Non Grata

15.6 The process by which an ambassador or other diplomatic agent who is personally unacceptable to the receiving government is removed has been known under varying descriptions at different periods—expulsion (the general term in the sixteenth, seventeenth, and eighteenth centuries), request for recall of the diplomat, dismissal (strictly an inappropriate term, since it is for the sending State, not the receiving State, to 'dismiss' a diplomat from its service), refusal to receive or to continue to receive the diplomat, and 'sending the diplomat his passports'. This last expression derives from the former practice of diplomats depositing their passports with the ministry of foreign affairs and the expression, along with the practice, is now obsolete. Under modern practice the usual procedure is for the receiving State to 'request the recall of a diplomat' and for the sending State to comply. Only if compliance is delayed or refused does the receiving State proceed to a formal notification of *persona non grata* under the procedure set out in Article 9 of the Vienna Convention on Diplomatic Relations. 'Png' and 'to png' are the standard colloquial terms. Whatever terminology is employed, the characteristic feature of the *persona non grata* procedure is that it is the diplomat personally who has offended the receiving government. Where the displeasure is not with the diplomat personally but with the policies or actions of the sending State, the correct course for the receiving State is to break diplomatic relations, or in a less serious case to 'recall its ambassador for consultations'. Nor should a declaration or declarations of *persona non grata* be used for the purpose of reducing the number of diplomatic staff in the mission of the sending State.

[5] Court Circular, 25 February 2009.

The correct procedure for that purpose is now set out in Article 11 of the Vienna Convention.

15.7 An early example of correct use of the *persona non grata* procedure was the expulsion of the Spanish Ambassador de Mendoza by Queen Elizabeth I of England.

> In 1584 one Francis Throkmorton was arrested in England, in consequence of a letter he had written to Mary Queen of Scots, which was intercepted, and the investigation showed that Don Bernardino de Mendoza, the Spanish Ambassador, was party to a plot which aimed at the deposition of Queen Elizabeth I. Camden[6] relates that while Throkmorton was under examination 'Don Bernardino de Mendoza, the Spaniard's Embassadour in England, secretly crossed the seas into France, in a great rage and fury, as if he had been thrust out of England with breach of the privilege of an Embassadour, whereas he himselfe being a man of a violent and turbulent spirit, abusing the sacred privilege of an Embassage to the committing of treason, was commanded to depart the land, whereas by the ancient severity, he was to be prosecuted (as many thought) with fire and sword. For he had his hand in those lewd practises with Throkmorton and others for bringing in of forreiners into England, and deposing the Queen. . . . But yet lest the Spaniard should thinke, that not Mendoza's crimes were punished, but the privileges of his Embassadour violated, William Waad Clerke of the Councell, was sent into Spaine, to inform the Spaniard plainly how ill he had performed the office of his Embassie; and withal to signifie (lest the Queene by sending him away might seeme to renounce the ancient amity betwixt both kingdomes) that all offices of kindnesses should be shewed, if he would send any other that were desirous to preserve amity, so as the same kindnesses might in like sort be shewed to her Embassadour in Spaine.' Waad, however, was refused an audience of the Spanish King and 'returned' home unheard.

This account illustrates the practice that became general: the offence was a personal—indeed a serious criminal one—and the receiving sovereign tried to make it clear that her quarrel was with the Ambassador personally and not with the sending sovereign.

15.8 Later examples from the nineteenth century confirmed the practice of asking for recall of an envoy whose conduct was regarded as unacceptable.

> In 1846 Mr Jewett, the United States Chargé d'Affaires at Lima, became involved in a dispute with the Peruvian Minister for Foreign Affairs, in the course of which he characterised a decree which had been officially communicated to him as 'a compound of legal and moral deformities presenting to the vision no commendable lineament, but only gross and perverse obliquities.' He also omitted to address the minister as 'Excellency' or 'Honourable' in written communications. He was recalled in consequence of a reiterated request from the Peruvian Government. In the

[6] *Annales Rerum Anglicarum et Hibernicarum, regnante Elizabetha,* translated by R N Gent (3rd edn, London, 1635) 263–4.

despatch to Mr Jewett, the Secretary of State laid it down that 'if diplomatic agents render themselves so unacceptable as to produce a request for their recall from the government to which they are accredited, the instances must be rare indeed in which such a request ought not to be granted. To refuse it would be to defeat the very purpose for which they are sent abroad, that of cultivating friendly relations between independent nations. Perhaps no circumstances would justify such a refusal unless the national honour were involved.'[7]

In 1871 Mr Fish, the United States Secretary of State, informed the United States minister at St Petersburg that the conduct of M. Catacazy, Russian minister at Washington, both officially and personally, had for some time past been such as 'materially to impair his usefulness to his own government and to render intercourse with him, for either business or social purpose, highly disagreeable'; that in these circumstances the President was of opinion that the interests of both countries would be promoted if the head of the Russian legation were changed; and it was hoped that an intimation to this effect would be sufficient. The President eventually consented to tolerate M. Catacazy until after the intended visit of the Grand Duke Alexis to the United States. On this occasion the Secretary of State reaffirmed the United States view that an official statement that a diplomatic agent had ceased to be *persona grata* 'is sufficient for the purpose of obtaining his recall.'[8]

15.9 Other cases may, however, be noted where a request for withdrawal of a diplomat who was no longer acceptable to the receiving State was not met and the matter led to some dispute between the two governments. In most of the cases where this occurred it is clear that the conduct of the diplomat was authorized or at least sanctioned by his government, and the incident could not appropriately be dealt with by means of the *persona non grata* procedure, since it reflected a real difference on substantive matters between the governments concerned. The following are examples in this category:

1. In 1852 the United States Government asked for the recall of Señor Marcoleta, the Nicaraguan minister, which was refused. The Secretary of State then informed Señor Marcoleta that the request for his recall had been renewed and that meanwhile no communication could be received from him in his official capacity. The charge against him was that he had communicated to the Press certain proposals in regard to an inter-oceanic canal which had been shown to him unofficially and in confidence. He not only tried to frustrate the negotiation, but also boasted of his influence with certain senators and threatened to use it. The Secretary of State wrote to the United States minister at Nicaragua that a request for recall 'can never be refused between governments that desire to preserve amicable relations with each other; for a minister whose recall has been asked loses, by that fact alone, all capacity for usefulness. If previously unacceptable, he must become doubly so by being retained in office in opposition to a

[7] *Annales Rerum Anglicarum et Hibernicarum, regnante Elizabetha*, translated by R N Gent (3rd edn, London, 1635) Vol 4, 492.

[8] J W Foster, *A Century of American Diplomacy,* 433.

distinct wish expressed for his recall.' The Nicaraguan minister was, however, not recalled but later presented fresh credentials to a new President of the United States and remained in Washington as minister until 1856.[9]

2. In 1905 M. Taigny, French minister to Venezuela, protested to the Venezuelan Government at their action in summarily closing under decree the offices of the French cable company at Caracas and elsewhere. In the view of the French Government this constituted a violation of the rights of the company. The Venezuelan Government denied the right of the French Government to take the matter up through the diplomatic channel, claiming that diplomatic representations could be made only if there had been a denial of justice, which was not the case. A dispute followed, during which the Venezuelan Government expressed the hope that the French Government would send a representative with whom more agreeable relations could be entertained. M. Taigny remained in charge, but was not invited on the occasion of the New Year official reception of the diplomatic corps by the President, and it became apparent that only on his recall would the Venezuelan Government resume official relations. The French Government announced his recall, leaving their interests in charge of the United States minister. On M. Taigny going on board s.s. Martinique to ascertain the instructions of his Government he was refused permission to return on shore and thus virtually expelled from the country. The diplomatic body protested against this act as contrary to diplomatic immunity, but the Venezuelan Government maintained that immunity had lapsed with his actual recall. In consequence the French Government on 18 January 1906 notified the Venezuelan chargé d'affaires that his mission was terminated and he should leave French territory the same day. He was escorted to the frontier that evening. Diplomatic relations between the two countries were suspended for several years.[10]

15.10 At this period, however, a few governments and in particular the British government expected reasons to be given when asked to recall one of their diplomats abroad, and reserved the right to examine these reasons and not to recall the diplomat unless satisfied that the reasons were adequate:

> The Paris Revolution of 1848 led in Spain to the adoption of reactionary measures by the government, and the reports received by Lord Palmerston from the British Minister, Mr Bulwer, induced him to recommend to the Spanish Government adoption of a legal and constitutional course of government. After holding up as a warning to the Spanish Cabinet the recent fall of the French King he added: 'It would then be wise for the Queen of Spain, in the present critical state of affairs, to strengthen the Executive by enlarging the basis upon which the administration is founded, and by calling to her councils some of those men who possess the confidence of the Liberal Party.' When this advice was passed on by the British Minister, it was bitterly resented as interference in the domestic affairs of Spain, and the Spanish Minister in London was instructed to ask for Bulwer's recall. Palmerston

[9] Ibid, 497.

[10] C de Boeck, 'L'Expulsion et les difficultés internationales qu'en soulève la pratique' (1927) *RdC* 502.

refused to recall Bulwer, who was then 'dismissed' by the Spanish Minister for Foreign Affairs. A protracted dispute followed and led to interruption for two years of diplomatic relations between Britain and Spain. Lord Palmerston repeatedly called for a statement of the grounds on which the Spanish Government had sought Bulwer's recall, and he stated the British position in this way: 'The Duke of Sotomayor, in treating of that matter, seems to argue as if every government was entitled to obtain the recall of any foreign minister whenever, for reasons of its own, it might wish that he should be removed; but this is a doctrine to which I can by no means assent . . . it must rest with the British Government in such a case to determine whether there is or is not any just cause of complaint against the Brtish diplomatic agent, and whether the dignity and interests of Great Britain would be best consulted by withdrawing him or by maintaining him at his post.'[11]

In 1888 the legal views of Britain and the United States clashed over the affair of Lord Sackville.[12] The United States Government, insisting on their right to have Lord Sackville recalled without giving reasons for their request, quoted Calvo as authority for their position: 'When the government near which a diplomatic agent resides thinks fit to dismiss him for conduct considered improper, it is customary to notify the government which accredited him that its representative is no longer acceptable, and to ask for his recall. If the offence committed by the agent is of a grave character, he may be dismissed without waiting the recall of his own government. The government which asks for the recall may or may not at its pleasure, communicate the reasons on which it bases its request; but such an explanation cannot be required.'[13]

15.11 The position then taken by the United States and by most other States is now set out in Article 9 of the Vienna Convention which states that:

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

These procedures are intended to ensure that when a diplomat becomes personally unacceptable to the receiving State, the matter is handled with as little embarrassment to him as possible and in the way least likely to lead to protracted and

11 Moore, *Digest of International Law,* Vol. 4, 538–9; Correspondence Presented to Parliament (1848).

12 See Chapter **9**, paragraph **9**.57.

13 C Calvo, *International Law* (4th edn), Vol 3, 213; Moore, op. cit., Vol 4, 536.

unprofitable dispute between sending and receiving States. In most cases the reasons for the recall are known both to the sending and the receiving State, but they are not discussed in diplomatic correspondence or in public. The diplomat may have against him evidence of a serious criminal offence, such as espionage or fraud, he may have taken some action which is resented by the receiving State as interference in its internal affairs, or he may simply have given offence by his personal manner, attitudes, or conduct. If both States agree, the matter may be handled so quietly that it does not become public knowledge at all that the diplomat concerned has left before the end of his normal tour of duty.

15.12 The Vienna Convention makes clear that a diplomat may be declared *persona non grata* before arrival and in that event he need not be granted a visa or admitted on arrival. There is no *agrément* procedure for diplomats other than the head of mission (and in some States for defence attachés) and so this possibility may be of importance if the receiving State finds that it has been notified of the imminent arrival of someone newly appointed to a diplomatic mission and is aware that serious criminal charges have been made against him or suspects that he is a spy.

15.13 The rules, however, do not lead to the avoidance of dispute or political tension between sending and receiving States in all cases. Probably the most dramatic use of the *persona non grata* procedure occurred in 1971 when the British government requested the withdrawal of 105 Soviet government officials, many of them on the diplomatic staff of the embassy of the Soviet Union in London. On the instructions of the Foreign Secretary Sir Alec Douglas-Home, Mr Ippolitov, the Soviet chargé d'affaires, was asked to call on Sir Denis Greenhill, Permanent Under-Secretary. He was handed an aide-mémoire which contained the government's request for the withdrawal of the officials in the following terms:

> When Mr Gromyko visited London in October 1970 he spoke of the desirability of improving Anglo-Soviet relations. It is the sincere wish of Her Majesty's Government to bring about such an improvement. There is however one matter of importance which has repeatedly caused friction in Anglo-Soviet relations. This is the scale of intelligence-gathering activities by Soviet officials in this country.
>
> This subject was raised with Mr Gromyko by Sir Alec Douglas-Home, first in conversation in London and subsequently in a letter dated December 3, 1970, written at Mr Gromyko's suggestion, and in a further letter dated August 4, 1971. These letters have not been answered, nor even acknowledged.
>
> Meanwhile inadmissible activities by Soviet officials in Britain have continued. During the last twelve months a number of Soviet officials have been required to leave the country after being detected in such activities. During the same period it has been decided not to issue visas to a number of officials nominated to Soviet establishments in the United Kingdom on account of their previous activities.

The staffs of the Soviet Embassy and the Soviet Trade Delegation, which form the two largest elements in the Soviet official establishment in Britain, far outnumber the British officials working in the Soviet Union.

Her Majesty's Government have tolerated the growth of these establishments. They have not sought to bargain increases in the Soviet establishments in this country against increases in the British establishment in the USSR; nor have they sought to establish any fixed relationship between the Soviet commercial establishment in this country and the growth of British exports to the Soviet Union. Evidence has however been accumulating that this tolerance has been systematically abused.

The abuse is a matter of serious concern to her Majesty's Government as a direct threat to the security of this country. Moreover the recurring need to request the withdrawal of Soviet officials from this country, or to refuse visas to certain officials selected for service in this country, imposes strains on Anglo-Soviet relations. So do unjustified acts of Soviet retaliation such as the recent expulsion of Mr Miller, Mr Nicholson and Mr Jackson.

The Soviet Government can hardly fail to be conscious of the contradiction between their advocacy of a conference on European security and the scale of the operations against the security of this country which Soviet officials and agents controlled by them have conducted.

Her Majesty's Government would like to see this contradiction resolved before the preparation of a conference on European Security begins.

The Soviet Embassy is therefore requested to arrange for the persons named on the attached list, all of whom have been concerned in intelligence activities, to leave Britain within two weeks from the date of this aide-memoire. Henceforth:

(a) The numbers of officials in (i) the Soviet Embassy (ii) the Soviet trade delegation and (iii) all other Soviet organisations in Great Britain will not be permitted to rise above the levels at which they will stand after the withdrawal of the persons named in the attached list;
(b) If a Soviet official is required to leave the country as a result of his having been detected in intelligence activities, the permitted level in that category will be reduced by one.

The Soviet Embassy is also asked to take note that the Soviet citizens named on the second list attached, who are believed to have left the country but still hold valid reentry visas, will not be permitted to return to Britain, on account of their participation in intelligence activities.[14]

The officials concerned were recalled within the time limit set and the affair led to a prolonged coolness in the relations between Britain and the Soviet Union. The drastic measure did however lead to a significant drop in espionage activity in Britain and it was some years before the provision for reduction of the overall

[14] The text of the aide-memoire was printed in *The Times,* 25 September 1971.

ceiling on embassy numbers had to be invoked by the UK in response to espionage by Soviet agents.

15.14 In October 1976, evidence of widespread smuggling and illegal sales of drugs, alcohol, and cigarettes by North Korean diplomats in Scandinavia led to a series of declarations of *persona non grata.* The first country to act was Denmark, which gave the North Korean ambassador and his entire diplomatic staff six days to leave on the grounds that they had turned their embassy into a front for the illegal import and sale of drugs, liquor, and cigarettes. This followed the seizure of 385 pounds of hashish, estimated at about £200,000. The North Korean ambassador initially denied all the charges. A few days later the government of Finland disclosed that Finland had been used as a transit station for drugs destined for other Scandinavian countries, and declared *persona non grata* the North Korean chargé d'affaires and three other diplomats. The chargé d'affaires at first refused to go and demanded that the Finnish government should review 'the illegal decision'. The following day the North Korean ambassador to Norway and Sweden was declared *persona non grata,* together with four of his diplomatic staff. On this occasion however the diplomats concerned were recalled and returned home immediately. The Swedish foreign minister said that her government was 'deeply disturbed by the fact that officials at a foreign embassy had so seriously misused their diplomatic immunity in committing such obvious criminal activity'.[15]

15.15 In its 1985 Review of the Convention which followed the shooting from the Libyan People's Bureau described in Chapter **8** above and an enquiry and report by the House of Commons Foreign Affairs Committee, the United Kingdom government set out in detail its policy regarding the expulsion of persons entitled to diplomatic immunity who were alleged to be involved in serious criminal offences as follows:

> As a general rule espionage and incitement to or advocacy of violence require an immediate declaration of *persona non grata*. Those involved in violent crime or drug trafficking are also declared *persona non grata* unless a waiver of immunity is granted. In addition the following categories of offence normally lead to a request for withdrawal in the absence of a waiver:
>
> (a) firearms offences;
> (b) rape, incest, serious cases of indecent assault and other serious sexual offences;
> (c) fraud;
> (d) second drink/driving offence (or first if aggravated by violence or injury to a third party);
> (e) other traffic offences involving death or serious injury;

[15] *The Times,* 16, 21, 22, and 23 October 1976.

(f) driving without third party insurance;
(g) theft including large scale shoplifting (first case);
(h) lesser scale shoplifting (second case);
(i) any other offence normally carrying a prison sentence of more than 12 months.

The criteria for dealing with alleged offences are applied with both firmness and discretion, but not automatically. Full account is taken of the nature and seriousness of the offence and any inadequacies in the evidence.[16]

15.16 The United States has in Guidance for Law Enforcement Officers in 1988 stressed that although it is by the terms of Article 9 of the Vienna Convention under no legal obligation to give reasons for a request for withdrawal or declaration of *persona non grata*, it will take this step only if there is reasonable certainty that a criminal act has been committed. To act in an arbitrary or prejudiced way in invoking such an extreme tool would not serve the reputation of the United States as a society governed by the rule of law, and if it could not be defended to the other government concerned could lead to a reciprocal measure against an innocent American diplomat.[17] By contrast, the United Kingdom has in a few exceptional cases required recall of diplomats without suggesting that they were personally involved in unlawful activity. These included its response to the failure of the Russian government to extradite Andrey Lugovoy to stand trial in Britain for the murder by poisoning with polonium-210 of the dissident and former Russian security service officer Alexander Litvinenko or to cooperate in the search for a solution.[18] In all States, where a retaliatory expulsion of diplomats takes place, the diplomats required to leave are also selected without regard to their own personal conduct. There are occasions when a receiving government without going so far as to png the person concerned may intimate to an embassy that the behaviour of one of its diplomats has caused it such displeasure that he will no longer receive any assistance or cooperation from the host government and that it would be in the best interests of both countries if the sending government were to withdraw him. Such an incident occurred in the 1960s in Paris when, after a Western diplomat was overheard making disobliging remarks about the then French President, Charles de Gaulle, the French government took the action described above. In 1997 the Yugoslav government of Slobodan Milošević threatened a Western ambassador with expulsion for interference in internal affairs during the mass demonstrations against the Yugoslav government's vote rigging and again a few months later for importing decoders via the diplomatic bag to distribute to opposition radio stations to help them relay news broadcasts.

16 Review of the Vienna Convention, 1985, Cmnd 9497, paras 60–71.
17 Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel, 27 ILM (1988) 1617, at 1633.
18 Hansard, HC Debs. 16 July 2007 cols 21–8.

When the ambassador responded that the cause of the protest was not alleged misuse of the diplomatic bag but attempt at censorship of the opposition media and that he would recommend that recently granted trade concessions to Yugoslavia be withdrawn, the government backed down and the ambassador remained.

Withdrawal of a Diplomatic Mission

15.17 The recall of an entire diplomatic mission, whether on a temporary or on an indefinite basis, without breach of diplomatic relations between sending and receiving States is now a relatively frequent procedure. Recall may take place for political, economic, or security reasons. In all cases the two States remain formally in diplomatic relations and there are no constraints in their contacts at international conferences or organizations or in third States. Normally it is hoped that a permanent diplomatic mission may be re-established under more favourable circumstances, and this is more straightforward when no formal breach of relations has taken place. A formal breach is usually very difficult to reverse quickly, even if the reason for it has disappeared. In 1956, for example, Saudi Arabia broke relations with the United Kingdom and France on 6 November, one day before the cease-fire which brought an end to their intervention in Suez, but relations were not restored between Saudi Arabia and either State until 1962.

15.18 An example of recall of a mission for political reasons took place in 1981 when in response to Libya's support for international terrorism the United States closed its embassy in Libya and asked Libya to close its mission in Washington, saying that the action 'reduces our relations with Libya to the lowest level consistent with maintenance of diplomatic relations'.[19] Closure of diplomatic missions for reasons of economy is carried out even by highly developed States following review of their overseas representation and of the justification for individual posts in terms of the extent of business to be carried out. In Chapter 6 above, it was explained that financial constraints often lead to a decision not to establish a permanent mission and the same reasons also lead to closures. In 1998, following the bombing by Al Qaeda of US embassies in Kenya and Tanzania, the United States closed its embassies in those States and in a number of other States in Africa because of fears as to their physical security.[20] In 1990, during the military action to liberate Kuwait from occupation by Iraq, many Western States withdrew their

[19] (1981) *AJIL* 957.
[20] *The Times*, 25 and 28 August 1998, 25 June 1999.

diplomatic missions while stressing that this was not acceptance of the demand by Saddam Hussein for their closure on the ground that Kuwait had become a province of Iraq and that they remained in full diplomatic relations with Kuwait.[21] In all these cases, it is normal for arrangements to be set up for protection of interests, and these are described in Chapter **16** below.

Breach of Diplomatic Relations

15.19 The mission of a diplomatic agent comes to an end on a break in diplomatic relations between the sending and receiving States. The functions of the diplomatic staff concerned terminate on notification by the State which initiates the breach since—as explained in Chapter **6** above—the existence of diplomatic relations depends on agreement by the two States concerned. Privileges and immunities of all members of the mission subsist in the normal way until they leave the country, or have had a 'reasonable period' of opportunity to do so, or are reaccredited as diplomatic agents of the protecting Power should they stay on in that capacity. Arrangements for protection of interests are explained in Chapter **16** below. In addition the receiving State is bound to permit diplomatic agents (with the exception of its own nationals) to leave the country, and Article 45 of the Vienna Convention requires the receiving State to respect and protect the premises of the mission, together with its property and archives. As is emphasized by Articles 44 and 45 of the Vienna Convention, a rupture of diplomatic relations, whether or not followed by hostilities, does not in itself affect the obligations of the receiving State to protect members of the mission, as well as its premises, property, and archives. When the diplomatic agent's functions terminate on account of a breach in relations, the courtesies associated with normal recall described in paragraph **15**.2 above are not observed.

15.20 Until the First World War the breaking of diplomatic relations was very often the prelude to war or to some form of military action, but this is no longer the case. Since 1945 it may occur that two States are involved in war or in some form of armed conflict without diplomatic relations being broken (as was the case with India and Pakistan in 1965 and again in 1971), and it also happens that diplomatic relations are broken between two States without any intention on either side to resort to military action. Breach of relations is however an extreme action usually taken by the initiating State in response to a severe injury to its own perceived interests. The United Kingdom, for example, broke diplomatic relations with Libya in 1984 following the fatal shooting from Libyan mission

[21] This response was required by Security Council resolution 664.

premises of a policewoman protecting these premises in the context of a demonstration by Libyan dissidents and the failure of the Libyan government to take any realistic steps to permit the murder to be investigated. In 1986 it broke diplomatic relations with Syria on the basis of evidence of active involvement of the Syrian embassy in a plot—discovered in time by the Israeli security authorities—to sabotage an El Al airliner and kill all the passengers on board. For many years during which Germany was divided, the government of the Federal Republic of Germany under the Hallstein doctrine broke diplomatic relations with any State (with the sole exception of the Soviet Union) which recognized East Germany as a separate sovereign State. In 2008 Serbia withdrew ambassadors from any country which recognized Kosovo as an independent State.

15.21 Relations may also be broken by way of strong protest at some action by another State not directed against the State initiating the breach but affecting an issue of widespread concern. In 1965, for example, seven African States broke diplomatic relations with the United Kingdom in protest at its handling of Rhodesia's unilateral declaration of independence.

Disappearance of the Head of the Sending or the Receiving State

15.22 Following the disappearance of the head of state, either of the sending State or of the receiving State, it is normally quickly apparent whether or not diplomatic appointments will be renewed as a matter of course. Only very exceptionally (for example when the Royal Government of National Union of Cambodia replaced the government of the Khmer Republic in May 1975)[22] is there an interval before it becomes evident whether diplomatic appointments are being renewed.

15.23 Where in either State a monarch or other hereditary ruler is replaced by his successor, whether constitutionally or otherwise, or where in either State changes not provided for in the constitution lead to the emergence of a new head of state, it is general practice that ambassadors who remain at their posts are provided with fresh credentials. Under Article 16 of the Vienna Convention on Diplomatic Relations, ambassadors' order of precedence is unaffected when this occurs. On the other hand, the replacement in either State of a president or other elected or appointed head of state, whether on death, resignation, or expiry of his term of office, has never been regarded as making fresh credentials necessary. It is sometimes difficult to determine whether the constitutional change which has

[22] See Chapter **6**, paragraph **6**.12 above.

occurred is of a nature to make fresh credentials necessary, and the modern tendency is, in cases of doubt, neither to seek nor to issue fresh credentials. This is particularly the case when for political reasons it is desired not to draw attention to the change which has occurred.[23]

15.24 Where the change in the head of state of a sending or receiving State takes place as a result of violent revolution or armed conflict, it is more usual that diplomatic appointments are not confirmed. A radically new government will wish to replace former ambassadors by appointing new ones sympathetic to their own views. If the sending State has merged with or been absorbed by another State it will—as explained in Chapter **6** above—no longer have the right to send or receive ambassadors at all. Where the government changes in the receiving State, other States may not recognize the new government in control of the capital, or may withdraw ambassadors to indicate displeasure with the new régime. The new government itself may not wish to remain in diplomatic relations with all the States which formerly sent ambassadors to it, or may wish fresh appointments to be made simply in order to indicate its distaste for persons who did business with its predecessor.

15.25 Where the government in the receiving State falls as a consequence of armed conflict, it is likely that ambassadors and their staffs will for security reasons—as explained above—have been withdrawn in advance. The diplomatic missions of all Western States were withdrawn before the fall of Saigon in 1975, and the French mission to Cambodia was alone in remaining staffed until after the fall of Phnom Penh a few weeks earlier. Where, however, some violent or unconstitutional change has occurred and ambassadors remain at their post, they may not enter into any form of official contact with the newly established authorities until instructed by their governments that recognition is being accorded to the new government in the capital. When a new government establishes itself by means of a *coup d'état,* revolt, or revolution, it is customary for a circular Note to be sent to the heads of the diplomatic missions remaining in the capital, informing them of the establishment of the new government and expressing the wish that diplomatic relations should continue between that State and the States which have accredited the ambassadors receiving this Note. Since to acknowledge this Note could imply recognition of the new government, it should not be acknowledged until instructions authorizing this are received from the home capital.[24] There may be delay due to consultations among groups of closely associated States (for example the European Union or the African Union), regarding the policy and

[23] See Chapter **6**, paragraph **6.**10 above.
[24] See also Chapter **14** above regarding contacts in the absence of recognition.

timing of any recognition. The acknowledgement of a Note of this kind is now the most common way in which a new government is recognized and the intention to continue diplomatic relations is confirmed, and the procedure was used, for example, on the emergence in 1972 of Bangladesh as an independent State following its secession from Pakistan.

15.26 Following the deposition of Saddam Hussein by military force in 2003 and the establishment of a Coalition Provisional Authority as the interim government of Iraq, the United States stated that ambassadors and other diplomats remaining in post in Baghdad were not regarded as exercising diplomatic functions.[25] Some governments sent special representatives to the Coalition Provisional Authority. After the interim Iraq government assumed sovereign powers one year later, relations with it were established on a normal basis.

15.27 Where the government in the sending State disappears in some violent conflict, ambassadors and their staffs abroad will have to assess their position in the light of the circumstances. An ambassador retains his diplomatic and representative status up to the moment when the receiving State makes clear that it has withdrawn recognition from the government which accredited him. After the fall of the government of President Allende of Chile in 1973 the new government in Santiago, before it had been recognized by the United Kingdom, dismissed the Chilean ambassador in London and appointed a member of the diplomatic staff as chargé d'affaires. The Chilean diplomats were divided in their loyalties, some being willing to serve the new government and some preferring to resign. Those willing to serve the new government assumed control of the chancery building while the Ambassador remained in his official residence, which was separate. In this situation the Foreign and Commonwealth Office made clear that, since they had not withdrawn recognition from the government of President Allende, they continued to regard the ambassador accredited by him as the ambassador of Chile and did not regard his functions as having terminated. The government therefore refused to cooperate when the unrecognized chargé d'affaires asked for assistance to evict the Ambassador from his residence. Shortly afterwards, however, the United Kingdom recognized the new government in Chile and from that time regarded the chargé d'affaires appointed by that government as head of the mission of Chile.

15.28 An ambassador may on the other hand prefer to resign on the fall of the government which accredited him, without waiting for the receiving State to withdraw recognition of that government. On the fall of the government of the Republic of Vietnam in 1975 the Ambassador in London notified the Foreign and

[25] State Department Press Briefing 29 May 2003.

Commonwealth Office of his resignation and that of his entire staff nine days before the recognition by the United Kingdom of the Provisional Revolutionary Government of South Vietnam. The Foreign and Commonwealth Office accepted that this resignation terminated his functions as ambassador and at his request assumed temporary custody of the premises and property of the embassy. These were later returned to the chargé d'affaires of North Vietnam, which was—during the period before reunification of North and South Vietnam a year later—protecting the interests of South Vietnam in the United Kingdom. On the collapse of the government headed by Saddam Hussein in 2003, ambassadors appointed by him to posts abroad for the most part burnt or shredded documents and quietly left their posts.[26] The receiving State must in the conduct of its diplomatic relations with the State undergoing violent change have regard only to the statements or communications of whichever government it recognizes at the relevant time as the government of that State. It is, however, entitled to presume, when it recognizes a new government, that unless that new government has made clear by direct communication or by public announcement that its country's previously appointed ambassador has been recalled or dismissed, the ambassador continues to exercise his functions on behalf of the new government.

Facilities for Departure

15.29 Regardless of the circumstances in which the diplomatic mission comes to an end a diplomat or other member of a diplomatic mission who is not a national of the receiving State must be given under Article 44 of the Vienna Convention on Diplomatic Relations facilities to leave the receiving State and in case of need provided with the necessary means of transport. Members of their families—irrespective of their nationality—must also be permitted to leave. These rights apply in addition to continuing privileges and immunities under Article 39 of the Convention (described in Chapter **9** above) and apply even in case of armed conflict. These facilities for departure were uniformly granted in many States in Europe on the outbreak of the Second World War. In 1964, when the United Kingdom broke diplomatic relations with Libya, all those remaining in the diplomatic mission were transported under guard to Heathrow Airport and simultaneously the entire staff of the British embassy in Tripoli with their families were transported to the airport. Even the take-off of the two aircraft from London and Tripoli was synchronized.

[26] *The Times*, 11 April and 24 July 2003.

16

PROTECTION OF INTERESTS

Express Arrangements for Protection of Interests 16.7

Chapter **6** above explained the reasons why a State may choose not to enter into diplomatic relations with another State or not to establish a permanent diplomatic mission there. Chapter **15** set out the circumstances in which a diplomatic mission may be recalled either on a temporary or on an indefinite basis while formal diplomatic relations continue, or in which diplomatic relations may be broken. In any of these cases a sending State may ask another State to protect its interests in a receiving State where, for whatever reason, it is not represented by a permanent diplomatic mission. Arrangements under which one State protects the interests of another sovereign State in a third State are increasingly frequent and sophisticated. Such arrangements may offer to a sending State many of the advantages of a permanent diplomatic mission at less risk and cost to itself, and the functions to be carried out on behalf of the State whose interests are protected as well as the modalities of protection may vary considerably. **16.1**

The basic framework for protection of interests is set out in Articles 45 and 46 of the Vienna Convention on Diplomatic Relations. Article 45 covers the situation where diplomatic relations are broken off or a mission is permanently or temporarily recalled, and entitles the sending State both to entrust the custody of its mission premises, property, and archives to a third State acceptable to the receiving State and to entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State. It is not necessary for the receiving State to give express approval of a specific protecting State, and the notification and implied acceptance are normally carried out informally. It is not however permitted under the Vienna Convention for a receiving State to withhold its consent to any protecting State so as to nullify the right of the unrepresented State to have its interests protected. Such a course was taken by Indonesia in 1961 following its breach of relations with The Netherlands, but was even **16.2**

then—before the Vienna Convention on Diplomatic Relations—widely criticized as contrary to international practice.[1]

16.3 By contrast, where there are no pre-existing diplomatic relations, prior consent of the receiving State is required before another State may set up any form of protection of its own interests there. Article 46 provides that

> [a] sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals

The reason for the discrepancy between Article 45 and Article 46 is that the protection of interests option, where there have been no previous relations, was seen when the Convention was drafted as an interim step to establishment of full relations or permanent diplomatic missions, both of which under Article 2 require the consent of both States. It is, however, no longer the case that the option is usually only temporary, and it is significantly more common than in 1961. Luxembourg for example, a small State with limited capacity for external representation, normally has its interests protected by Belgium. Many other small States accredit an ambassador to several States, as permitted by Article 5 of the Vienna Convention on Diplomatic Relations, and in capitals where the ambassador is non-resident and there is no permanent mission, it is frequent for another State to be asked to act as protecting Power.

16.4 When a diplomatic mission is recalled or relations broken, a sending State is entitled in the receiving State, first, to a reasonable period for withdrawal of the head and members of its mission, and during this period its premises will continue to be entitled to inviolability. The Vienna Convention does not define what is 'reasonable' in this context and in practice much will depend on the circumstances leading to the withdrawal of the mission or breach in relations. Where withdrawal is low-key and due, for example, to economic circumstances, the receiving State will normally grant more than the one-month period usual in the case of departure of an individual diplomat to allow the sending State to dispose of premises and property or possibly to conclude protection arrangements. On the other hand, where the breach is acrimonious, the receiving State may require withdrawal much more swiftly. When the United Kingdom broke relations with Libya in 1984 following the shooting from the Libyan People's Bureau of a British policewoman protecting the premises during a demonstration, seven days only were permitted for withdrawal, and until that period had elapsed the police did not enter the premises—even after they were in fact empty—to search for evidence relating to the murder. The premises were left empty under the custody of

[1] (1961) *RGDIP* 611.

the embassy of Saudi Arabia as protecting Power and it was made clear that the Libyans would never again be permitted to use them as a diplomatic mission in view of the public outrage at the events leading to the breach in relations.[2]

16.5 After the 'reasonable period' has elapsed, the premises are no longer regarded as 'used for the purposes of the mission' (the definition of mission premises under Article 1 of the Convention) so that full inviolability lapses. The authorities may enter them to check that they are secure and if leased the landlord may recover possession to the extent permitted under local law. The receiving State is however still bound by paragraph 1 of Article 45 to 'respect and protect the premises of the mission, together with its property and archives'. This duty to 'respect and protect' falls short of what is required in the case of inviolability, but normally precludes expropriation of the premises so long as title remains with the former sending State. If the premises are simply left empty, perhaps with valuable moveable property inside, the duty of protection may be an onerous one for the receiving State, which may well take the view that it cannot provide 24-hour security protection on an indefinite basis in the absence of any reimbursement of expenses by the sending State. Such was the experience of the United Kingdom in the years following the assumption of power in Cambodia in 1975 by the Pol Pot regime which made no response to an express invitation from the United Kingdom government to resume diplomatic relations, gave no instructions for custody or disposal of its former embassy premises or property but simply left their abandoned premises open to occupation by squatters. These difficulties were one reason why the UK made provision some years later, in the Diplomatic and Consular Premises Act 1987,[3] for a system of control of mission premises, provision for precise dates of commencement and termination of their status in accordance with rules of international law, and powers for the Secretary of State to expropriate and sell former premises 'if he is satisfied that to do so is consistent with international law'. The exercise of these powers in the case of the former Cambodian embassy was challenged in the Case of *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Samuel*.[4] The court there held that the action taken by the UK government to evict the squatters (who would otherwise have acquired title to the premises), take title to the premises, sell them and hold the proceeds in trust for the Cambodian government, was not in breach of the duty

[2] *The Observer*, 20 September 1987.

[3] c 46. A circular Note to diplomatic missions in London describing the provisions of the Act is printed in (1987) *BYIL* 541.

[4] Times Law Reports, 17 August 1989, 83 ILR 231.

of the UK government to 'respect and protect' the premises and could not be reviewed by an English court unless it was unreasonable or taken in bad faith.

16.6 The United States have similar powers[5] to preserve and protect premises of a former diplomatic mission where there is no protecting State and, one year after mission functions have come to an end, to dispose of them and remit the proceeds to the former sending State, and these powers were used in 1996 in regard to the former embassy of Somalia.

Express Arrangements for Protection of Interests

16.7 Situations such as those just described are obviously also unsatisfactory from the point of view of sending States with a long-term interest in the preservation of their embassy property and in many cases in restoration of a normal diplomatic presence at some later date. The sending State may in some cases also be responsible for a large community of expatriates living or working in the receiving State and in need of advice, political protection, and consular services. It is therefore much more common for an unrepresented State to entrust the protection of its interests in the receiving State to a third State and to take advantage at the least of the provisions of Articles 45 or 46 of the Vienna Convention described above. The choice of the third State asked to undertake this responsibility will depend on political as well as on practical considerations. Formerly Switzerland and Sweden were popular as protecting Powers because of their perceived neutrality. A State will wish to select a protecting Power sympathetic to itself, but also with reasonable working relations with the receiving State. Canada, on suspending its diplomatic relations with Nigeria in 1997 and recalling its high commissioner in Lagos, asked the United States to protect its interests there.[6] The United Kingdom when it broke relations with Libya in 1984 chose Italy as its protecting Power, while Libya chose Saudi Arabia. The close links among Member States of the European Union developed under the Common Foreign and Security Policy, now make it standard for one EU Member State to request another to act as protecting Power, but this may be impracticable where all EU Member States are involved in the reason for the breach of relations or join in a collective decision to break relations. From a practical perspective, the State chosen should have a reasonably solid diplomatic presence in the receiving State so that it will have sufficient staff to discharge the administrative, consular, and perhaps some limited political functions which are likely to be requested.

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[5] Foreign Missions Act 1982, s 205(c).
[6] *The Times*, 14 March 1997.

16.8 The negotiation of express and detailed arrangements for the protection of interests and for the reimbursement of expenses incurred became general practice during the later part of the twentieth century. In 1965, nine African States—Algeria, Congo Brazzaville, Ghana, Guinea, Mali, Mauretania, Sudan, Tanzania, and the United Arab Republic—broke diplomatic relations with the United Kingdom in protest at its response to the Unilateral Declaration of Independence by Southern Rhodesia.[7] In that context the United Kingdom developed a form of protection of interests arrangement which has since become widespread. The arrangements between the State seeking protection, the protecting Power, and the receiving State involve the retention of a few junior diplomatic, administrative, and technical staff belonging to the State seeking protection and their notification to the receiving State as members of the diplomatic mission of the protecting Power. The premises whose use for the purposes of the former mission has been discontinued are notified and accepted as premises of the mission of the protecting Power and in this capacity they will enjoy not only the 'respect and protection' described above but full inviolability.

16.9 Similar arrangements were set up on an informal basis in 1967 when Egypt broke diplomatic relations with the United States in the context of the Six-Day War and Spain assumed the responsibility of protecting US interests in Egypt. The US embassy formally became the American Interests Section of the Spanish embassy and was staffed originally by only a single United States administrator but later by six or seven staff led by a US diplomat of counsellor rank. In 1976 when Iceland broke relations with the United Kingdom during the 'cod war', a British Interests Section was established in Reykjavik within the embassy of France which became the protecting Power. This consisted of all the members of the former UK embassy other than the Ambassador, and they were instructed so far as possible to continue normal business.

16.10 The advantage of this kind of arrangement to the sending State is that many basic functions such as reporting on conditions in the receiving State and carrying out administrative and consular functions may be performed by members of its own service who are familiar not only with its general instructions to overseas officers but sensitive to the political and cultural requirements of the sending State for information. There is no need to reimburse a protecting Power for expenses incurred for functions carried out by staff in the Interests Section, although arrangements for protection of interests normally make provision for reimbursement of expenses incurred by the protecting Power. The tripartite arrangements will normally make clear what functions may be performed by the 'Interests

[7] For details, see Sfez, 'La rupture des relations diplomatiques' (1966) *RGDIP* 359, at 386.

Section' within the mission of the protecting Power. Political representations, for example, are not normally made by diplomats forming part of the Interests Section, and indeed the protecting Power may itself be unwilling to perform these in sensitive cases. When Westminster City Council brought proceedings against Iran for recovery of the expenses they had incurred in making the former Iranian embassy safe after its violent liberation from siege by the Special Air Service led to its total destruction by fire, English law required service of the writ on the ministry of foreign affairs in Tehran before proceedings could validly continue. Sweden however, which was at the time protecting British interests in Iran, regarded this task as too controversial and outside its duties as protecting Power (which were set out in the Agreement quoted in the following paragraph). In the absence of valid service on the government of Iran, the case against them as defendants could not proceed.[8]

16.11 Early international practice was to draft arrangements between the protecting Power and the State receiving protection of its interests, or tripartite arrangements involving the receiving State, as non-binding arrangements which did not require to be published. Recently however, a number of them have been published. In 1986 the United Kingdom published the diplomatic Notes setting out the arrangements under which, following the breach of relations by the United Kingdom in response to the proven involvement of Syria in the attempted sabotage of an El Al airliner, Syrian relations were to be protected by Lebanon and UK interests by Australia, with interests sections in the Lebanese embassy in London and the Australian embassy in Damascus.[9]

16.12 Sweden is now required by national legislation when accepting responsibility as protecting Power to conclude a binding international agreement with the State whose interests it is to protect, and such agreements must be published. An Agreement with the United Kingdom regarding protection of UK interests in Iran was concluded in 1989.[10] Article 1 of the Agreement provided:

> (1) Sweden undertakes to represent the United Kingdom as protecting power in the Islamic Republic of Iran.
> (2) The commission as protecting power comprises administrative, humanitarian and consular matters. If the commission is to be extended to cover other matters a separate agreement to that effect is required.
> (3) In dealing with protection matters, the protecting power may avoid taking action that could damage its position or good name in the receiving country, or in relation to any other country. In case of doubt in dealing with a matter, the

8 *Westminster City Council v Government of the Islamic Republic of Iran* [1986] 3 All ER 284; 108 ILR 557.

9 (1986) *BYIL* 554 and 625.

10 UKTS No 45 (1989) also printed in (1990) *ICLQ* 472.

> Ministry of Foreign Affairs in Stockholm shall take the decision. This always applies to letters and other messages from the commissioning country to the receiving country.

16.13 It is possible, though unusual, for States to be in consular relations without also being in diplomatic relations, and in such cases there is no need for special arrangements to enable the protecting Power to exercise consular functions on behalf of the State whose diplomatic interests it has agreed to protect. Some years after the Falklands War in 1982 between the United Kingdom and Argentina, consular relations between the two States were resumed as an interim step towards the resumption of full diplomatic relations a year later, in 1990.[11]

[11] *The Times*, 16 February 1990.

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17

PROTECTION OF EMBASSIES AND DIPLOMATS FROM TERRORIST AND OTHER ATTACKS

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Iraq

17.1 Early in the morning of 14 July 1958, troops of the Iraqi army attacked the Royal Palace in Baghdad, overpowered the Palace Guard, and killed the young King Feisul, the Prince Regent Abdul Illah, and the entire Royal Family. Meantime other troops spread through the city, a party of eight soldiers taking over from a police guard of 24 the protection of the British embassy compound.

17.2 Since there were in the city large numbers of people who disliked the monarchy, partly for local reasons and partly encouraged by broadcasts from Cairo Radio, crowds soon came out on the streets and many gathered at the gates of the British embassy, the Royal Family having had strong British connections. At about 8 a.m. a shot was fired, which turned out to have been due to clumsy handling of a weapon by an Iraqi soldier who thereby injured himself in the foot. But such was the tension in the city that the crowd found it only too easy to believe that the shot had been fired from the embassy residence, which lay nearer to the gates than the chancery. The crowd broke through the small party of soldiers, burst into the residence and burned to the ground the fine building and its attractive and valuable contents.

17.3 The Ambassador, Sir Michael Wright, and his household had retired to the chancery building by the riverside. In the confusion of these happenings, the military attaché, Lieutenant-Colonel Patrick Graham, was killed by a stray bullet.

17.4 The next day the Ambassador, without waiting for instructions, called on the leader of the coup d'état, General Qasim, who had by then fully established his authority, and requested a formal assurance of the safety of British subjects and their property, and a convoy in case an evacuation of British subjects should be needed. He added a formal protest over the failure to protect embassy lives and property. General Qasim expressed regret and added that a convoy would be provided even though he maintained that it would not be needed. On 16 July the Head of Protocol in the Ministry for Foreign Affairs called on Sir Michael Wright to express regret at what had happened.

17.5 On 19 July, having received instructions (the delay being partly accounted for by several days of interrupted communication with London) Sir Michael called on the Iraq minister for foreign affairs, repeated the requests already described, and added that the British government held the present administration responsible. In reply the minister questioned whether there was any established government which could be held responsible.

17.6 There was no immediate sequel to this conversation. But on 20 August the embassy received a verbal indication that the Iraq Cabinet had decided that compensation should be paid. This message was never confirmed in writing, but the embassy and the British government rightly assumed that the message should be treated as an official communication. Agreement on compensation was finally reached through top-level interventions in September 1959.

17.7 This case has been described in some detail because it contained many features which are bound to characterize such a situation—internal tensions in the country connected directly with external political relations, physical danger and loss, an immediate protest and request for future protection, followed by a protest on instructions and eventually, after due negotiation, the payment of compensation. Such a protest by the head of the diplomatic mission concerned, in anticipation of instructions, is politically and diplomatically important. Failure to make such an immediate protest would suggest, in the home country of the embassy attacked, timidity or negligence by the head of mission; to the government of the country where the event occurred, it might imply doubt as to the facts, and this could damage the success of a delayed démarche, however official. The situation is obviously a difficult one, since the government of the country where the incident occurred will have mixed feelings—a desire to make the best of its own case and embarrassment that such an incident should have occurred in its territory, whatever the cause.

An event of this kind contains elements of personal tragedy and of threat to the stability of political and diplomatic relations. But the element of accident in the shot which precipitated the destruction of a British embassy residence and the expressed regret of the new government that matters should have gone so far provided a basis both for surmounting immediate political shock and for agreeing on terms of compensation. But the other cases which follow were often more complex in their diplomatic implications. **17.8**

Indonesia

On 16 September 1963 the British government formally recognized the establishment of the Republic of Malaysia. This recognition was not welcome to President Sukarno's government in Indonesia, since one element of it was the formal acceptance by Britain that the Republic of Malaysia would include the territory of Sabah (formerly British North Borneo), to which Indonesia had laid claim. The Indonesian government's reaction was extremely sharp and was supported by popular demonstrations enjoying governmental approval. **17.9**

Foreseeing the possibility of trouble on 16 September, when Malaysia would come into existence, the British ambassador, Mr (later Sir) Andrew Gilchrist, requested, on 13 September, a 'small guard'. As he had foreseen, a large demonstration of young people duly collected on 16 September and threw stones at the building, breaking 400 plate-glass windows. In the evening, as a gesture of morale-raising defiance, Major Walker, the assistant military attaché to the embassy, walked round the damaged building playing the bagpipes. This performance gave rise to the pleasant legend that the Ambassador, a patriotic Scot, not only sanctioned it but played the bagpipes himself. The local diplomatic effect of the gesture can hardly have been advantageous, though subsequent events showed that there was little that could have been done through diplomatic channels. **17.10**

On 17 September the British embassy put in two Notes to the Indonesian Foreign Office, and U Thant, Secretary-General of the United Nations, publicly expressed disapproval of what had happened. However, soon after midday on 18 September there was a more determined attack on the chancery building. As fire spread, diplomats dispatched alarming telegrams to London while burning as many of the confidential archives as was possible. Some three hours later the building had to be evacuated. In the circumstances of the evacuation, much help, physical and diplomatic, was received from the United States embassy. The Australian and French embassies were also helpful. This informal but real aid was particularly valuable, since it was largely thanks to it that on 26 September, six days after the second attack, the British staff were allowed to reoccupy the building. **17.11**

17.12 For the next two years the compensation question remained deadlocked. The Indonesian government's policy continued to be the acquisition of all foreign investment in the country. Then political fate intervened. In September 1965 a political coup organized by the Indonesian Communist Party failed. A new government took over, headed by General Suharto, with Mr Adam Malik as foreign minister. Military 'confrontation' with Malaysia and Britain ceased, and in June 1966 Mr Malik reached a full agreement with Malaysia which was signed in August. Attention could then be given to the resolution of other differences between the Indonesian and British governments. A compensation agreement under which the Indonesian government paid in full all claims for the damage to the British embassy and for damage to property within it was signed on 1 December 1966.

China

17.13 A third case of destructive attack on a British mission took place in Beijing in 1967 during the Chinese 'Cultural Revolution'. This mass movement led to widespread turmoil throughout the year, involving both demonstrations against domestic authorities and attacks, marked by a recrudescence of anti-foreign sentiments, on a number of diplomatic missions. The Chinese Foreign Ministry had been temporarily taken over by members of extreme left-wing groups. Harassment was directed particularly at British diplomats because of events in the then British Crown Colony of Hong Kong. Severe restrictions were imposed on the movements of British diplomats in Beijing, which made it impossible for them to carry out the purposes for which they were accredited. The Chinese authorities also from time to time withheld exit permits for diplomatic personnel. The mood in China seemed to vary from week to week and the harassment of British officials led to restrictions on Chinese movements in Britain and, in August, to demonstrations by British crowds outside the Chinese mission in London. The diplomacy of the period moreover was highly unorthodox, the Chinese chargé d'affaires[1] in London, for instance, refusing to accept four written protests delivered to him.[2]

17.14 The Cultural Revolution had spread to Communist supporters in Hong Kong, where there was a bomb campaign and a menacing succession of riots directed against the Hong Kong government. Legal action was taken to restore public

[1] Mr Shen P'ing, who was appointed in 1975 Director of the Chinese Foreign Ministry's Asian Affairs Department.

[2] See Chapter **4**, paragraphs **4**.24–**4**.26.

order, which involved acting against, among others, certain Chinese journalists and representatives in Hong Kong of the official New China News Agency. These measures sometimes resulted in imprisonment and entailed the prohibition of the publication of at least three newspapers. They were described in Beijing as 'fascist atrocities'.

17.15 The first actual attack on British representation in China was not directed at the British mission in Beijing, but consisted of the invasion by a crowd on 16 May of the large British consulate-general compound in Shanghai. The consul-general and his family were subjected to indignities; furniture was wrecked and a portrait of the Queen destroyed. This resulted in an immediate representation to the Chinese chargé d'affaires in London, in which the British government reserved the right to claim compensation for the damage done to British property. The Chinese government on 22 May announced its decision to annul the 1954 agreement which provided for the British Office in Shanghai (which was not regarded by the Chinese as a consulate). The British chargé d'affaires protested at the unilateral abrogation of the agreement and in a message to the Chinese foreign minister on the same day the Foreign Secretary asserted that the agreement could not be unilaterally annulled and expressed willingness to accept negotiations on the question; he added that he had already decided to withdraw the British representative from Shanghai because of the treatment to which the representative and his family had been subjected, but that this action would not constitute acceptance of or acquiescence in China's unilateral decision to abrogate the agreement. Although the message was returned by the office of the chargé d'affaires in London and a copy delivered to the Foreign Ministry in Beijing was subsequently returned to the British mission, it was clear that its contents had been noted. The counsellor of the British mission in Beijing was summoned to the Foreign Ministry on 9 September to receive notification of an order by the Shanghai local authorities requisitioning the premises of the British Office in Shanghai. The counsellor duly protested and reserved the right to seek compensation. Subsequently, on 19 September 1967, the Chinese chargé d'affaires in London was summoned to the Foreign Office and given a Note formally setting out the British government's position in protesting at the requisition and reserving all their rights over the premises as well as the right to claim compensation.

17.16 Meanwhile on 7 June there had been officially inspired anti-British demonstrations in Beijing, under pretext of alleged British support for the Israelis in the 1967 Middle East war. An intrusion was made into the premises of the British mission, in the course of which the royal portrait was damaged. The intruders were without exception non-Chinese, being mostly Arab nationals resident in Beijing.

17.17 The most serious incident occurred on the night of 22 August 1967, immediately following the expiry of a Chinese government ultimatum to the British government, demanding that they release certain journalists imprisoned in Hong Kong or 'accept all the serious consequences'. At the moment when this ultimatum expired, a very large crowd of Chinese demonstrators (10,000 according to the New China News Agency), who had surrounded the British mission throughout the day and prevented the staff from leaving, entered the compound and set fire to and sacked the chancery building, which was completely destroyed. The British chargé d'affaires, Mr (later Sir) Donald Hopson, and his staff, including five women, on leaving the building were physically attacked and beaten by the crowd before being eventually rounded up by detachments of the Chinese Army who had been present throughout. The contents of the outbuildings, including all the mission's motor vehicles, were also burned, as were the contents of the residence of the chargé d'affaires, adjacent to the chancery.

17.18 The response of the British government was an immediate protest delivered by the minister of state at the Foreign Office, George Thomson, in which an assurance of future protection was demanded and the right to full compensation was asserted. A number of severe restrictions were placed on Chinese officials in Britain, notably a ban on moving more than five miles (eight kilometres) from the centre of London, or leaving the country without specific permission. Tension continued, and there was a demonstration in London by the staff of the Chinese embassy against the restrictions placed on them. However, at no time were diplomatic relations broken off.

17.19 On the 30 August a further hostile demonstration was directed against the British chargé d'affaires and his staff, who were obliged to appear publicly before the demonstrators. It was only after Mr Hopson had been physically manhandled by the Red Guards in an effort to get him to abase himself that soldiers intervened to prevent further developments. An attempt to obtain protection from the Chinese foreign ministry resulted only in advice to meet the demonstrators' requests. At the beginning of September the Chinese prime minister, Mr Chou-En-Lai, was reported to have issued a directive to the effect that in relation to foreign diplomatic missions Red Guards should be content to 'demonstrate but not penetrate'. Despite the seizure on 9 September by the Chinese authorities of the British consulate-general compound in Shanghai (mentioned in paragraph 17.15), there developed a clear inclination by both governments to diminish tension, and a number of restrictions were removed in succeeding months.

17.20 After prolonged negotiations for compensation, the Chinese government in March 1971 made clear their decision to bear the cost of rebuilding the chancery premises.

Iran

17.21 Perhaps the most egregious violation of diplomatic immunity came with the seizure of the US embassy in Tehran in November 1979 by a group of Iranian students in retaliation for US support for the deposed Shah. He had recently been admitted to the US for medical treatment and the US and the UK had in 1953 been heavily implicated in the removal of the democratically elected Mossadeq government and the imposition of the then young Shah. Fifty-two of the original 66 American diplomats were held hostage for 444 days and were released only after the inauguration of the new US president, Ronald Reagan. His predecessor's defeat in the US election was in part attributed to the hostage crisis and the abortive attempt by the US military to rescue the hostages in April 1980 when helicopter failures and a crash led to several fatalities and the abandonment of the mission. The end of the crisis was negotiated through the Algerian government as intermediary. Under the Algiers Accords signed in January 1981, the US released $8 billion of frozen Iranian assets which were used for the settlement of claims by United States citizens—private investors as well as the hostages themselves—and undertook not to intervene in Iran's internal affairs. Unlike other incidents described above, the students' action received enthusiastic support from the highest level of authority, Iran's Supreme Leader Ayatollah Khomeini, thus making the government responsible for the numerous breaches of international law. The relatively moderate government of Prime Minister Mehdi Bazargan resigned within a few days. While the affair created internal political shockwaves within the two countries directly affected, it was regarded with outrage by the international community as infringing the most basic tenets of international law: the inviolability of diplomats and other embassy staff as well as the inviolability of the premises and archives of a diplomatic mission. Sanctions were imposed against Iran not only by the United States but in solidarity by European Community Member States and by others (see Chapter **8**, paragraph **8.**16 above). One further aspect of the incident deserves to be highlighted. At the time of the takeover of the embassy, six US diplomats avoided capture and took refuge in the Canadian and Swedish embassies. Meeting in secret for the first time in peacetime, the Canadian Parliament passed the appropriate legislation allowing Canadian passports (with forged Iranian exit visas) to be issued to the US diplomats who were thus able to escape from Iran in January 1980 by taking a flight to Switzerland using their Canadian documents.[3]

[3] Green, 'Trends in the Law Concerning Diplomats' (1981) 132 *CYIL* 144–7.

17.22 In the course of the crisis, another incident took place in London when the Iranian embassy was taken over by Arab separatists demanding autonomy for Khuzestan in southern Iran. Twenty-six hostages were taken initially including a policeman on diplomatic protection duty although five were released over the first few days. On the sixth day of the siege, one of the diplomats was executed by the hostage-takers and his body thrown out of the embassy, with threats of further killings of hostages. This led to the immediate deployment of waiting British counter-terrorist forces, the Special Air Service (SAS), and the storming of the embassy. Five of the six terrorists were killed by the SAS and one of the remaining hostages was killed by the terrorists during the assault. The rest were safely released. Notwithstanding their own concurrent behaviour towards the US embassy in Tehran, the government of Iran vigorously insisted on their rights to diplomatic protection in London, claiming that the police protection had been inadequate and claiming compensation for the burnt-out premises. An agreement for compensation for claims and counter-claims was ultimately reached, as explained in Chapter **8**, paragraph **8**.18 above.

Lebanon

17.23 In April 1983, a suicide bomber drove a van into the US embassy in Beirut destroying a large part of the premises and killing over 60 members of the embassy staff and visitors. It was the worst attack on an embassy in terms of casualties seen up to that time and marked the first use of a suicide bomber in a terrorist attack on a diplomatic target. The attack is thought to have been perpetrated by Hizbollah, the pro-Iranian Shiite militia in Lebanon. Further attacks have followed over the years largely linked to the Western presence in the Middle East, and in particular the arrival of US troops in Saudi Arabia where some of the holiest shrines of Islam are to be found at Mecca and Medina. In December 1983, there were coordinated attacks on the US and French embassies in Kuwait with limited casualties. The US government responded to these outrages by commissioning a report into diplomatic security, the Inman report, and creating a Bureau of Diplomatic Security within the State Department and a Diplomatic Security Service. 'The particular hope was that the new professionalism introduced by the United States would encourage similar developments in other countries on a reciprocal basis with the United States, in particular, sharing best practice in a multilateral framework. In terms of the practicalities of diplomatic security, the Panel recommended "a substantial relocation and rebuilding program".'[4]

[4] J Craig Barker, *The Protection of Diplomatic Personnel* (Ashgate, 2006) 91–2.

Al Qaeda

17.24 The programme of rebuilding was given an initial budget of $366 million. Despite this substantial injection of capital, in August 1998, the US embassies in Nairobi and Dar es Salaam were simultaneously attacked by car bombs which killed over two hundred and injured several thousand people, mostly passers-by outside the premises. It appeared that both buildings had been completed prior to the implementation of the Inman report.[5] The claim of responsibility by the terrorist organization Al Qaeda brought it to widespread international attention for the first time, some three years before the 9/11 attacks in New York and Washington DC. In November 2003, Al Qaeda claimed responsibility for a series of suicide bomb attacks on two synagogues in Istanbul and, five days later, on the British consulate there and the HSBC bank. Some 30 people were killed in the second wave of attacks including the consul-general, Mr Roger Short.

European Terror Groups

17.25 Although many of the attacks on embassies and diplomats had a Middle East connection, there have been several attacks with a quite different motive. A prime example was the burning of the British embassy in Dublin in 1972 by an angry crowd after Bloody Sunday when 13 civil rights demonstrators were shot dead by British soldiers. The Irish government took the view that it was safer to allow the crowd to burn down the embassy—which was empty at the time—than to try to prevent it happening. The British government demanded and received compensation for the damage caused. Two British ambassadors, one in Dublin[6] and one in The Hague, were subsequently assassinated by the IRA in 1979. Turkish diplomats have been regular targets of Kurdish separatist terrorists and of the '17 November' terrorist group in Greece though most of the latter's targets have been US diplomats or Greek political or business figures. After the assassination of the British defence attaché, Brigadier Saunders, in Athens in 2000, the British government exerted considerable pressure on the Greek government to find the perpetrators. In 25 years and over 100 attacks, no individual had ever been charged. Finally, in 2002, 19 arrests were made, including the group leader and the chief of operations. Fifteen convictions were secured in 2003, since when there have been no further attacks by '17 November'.

[5] Ibid, 97.

[6] See K Hickman, *Daughters of Britannia* (Flamingo, 2000) 253–62 for a graphic diary account of the day of Christopher Ewart-Biggs' assassination and subsequent events.

Kidnappings and their implications

17.26 Attacks on embassies such as those described above presuppose either a degree of complicity (or culpable negligence) on the part of the host government or the activity of a terrorist group who are able to counter the security arrangements put in place by the host government and the foreign mission. The series of kidnappings of senior diplomats which occurred in the late 1960s and early 1970s were clearly of a different order. There was no need to storm and wreck an embassy in order to kidnap the head of it. Whereas the purpose of a mass demonstration might be to give vent to a natural or stimulated national emotion, the purposes of the kidnappings of individual diplomats were far more calculated and coldblooded. The object was nearly always to extract a particular concession from a government, under the threat that, if the concession were not granted, a human life would be lost and the government refusing the concession would be to blame, both generally and in the eyes of the country which the victim represented.

17.27 Nor, when the technique was new, could the security authorities of the country of the crime be specially blamed. Kidnappings of this kind were always carefully planned and the security authorities could hardly be expected to provide protection for every single senior diplomat, whether at home or during his or her comings and goings.

17.28 The first case of attempted kidnapping which really startled world opinion occurred in Guatemala City on 28 August 1968. The American ambassador, Mr John C Mein, was returning normally to his office from lunch at the embassy residence when his official car was blocked in a down-town street. Seeing a number of young men in fatigue uniform bearing down on the car, Mr Mein jumped out and ran, and was shot dead. The next day an organization called Fuerzas Armadas Rebeldes announced that he had been killed 'while resisting political kidnapping'. Seven months later, on 21 March 1969, in very similar circumstances, the Federal German ambassador, Count Karl von Spreti, was forced from his car by members of the same organization, who held him captive and demanded as the price for his freedom the release of 17 political prisoners. While the diplomatic corps were discussing the situation with the Guatemalan government and the German government were pressing for release on the conditions proposed, the price was raised to 25 prisoners and US$ 700,000, which the Germans offered to pay. The Guatemalan government insisted that some of the prisoners had already been convicted of crimes and that the verdict of the courts could not be set aside by executive order. While the discussion was still in progress the deadline set by the kidnappers passed and on 5 April the body of Count von Spreti was found with a bullet-hole in the temple. The Federal German

government claimed that the Guatemalan government had failed to meet its obligations under the Vienna Convention and virtually broke diplomatic relations with them.[7]

17.29 Other such events include the kidnapping in 1970 of Mr James Cross, British Trade Commissioner in Montreal, the kidnapping in 1971 of Mr (later Sir) Geoffrey Jackson, British ambassador in Uruguay,[8] the kidnapping and murder of the Israeli consul-general in Istanbul by Turkish terrorists in May 1971 and the appalling sequel to the occupation in March 1973 of the Saudi-Arabian embassy in Khartoum by the Arab 'Black September group', during which the American ambassador, Mr Noel, his counsellor, Mr Moore and the Belgian chargé d'affaires, Mr Eid, were murdered. Over 25 such kidnappings or attempted kidnappings took place in the years 1968–73.[9]

17.30 The basic purpose of kidnapping and holding as hostages people of diplomatic status was to cause the sending State to exercise pressure on the receiving State, which is responsible for his protection, to 'purchase' his release. The purchase price can be very precise, for instance the release by the receiving State of certain people held in prison—people probably of no direct interest to the 'victim' State at all. Or the purpose could be political but less precise, as in the kidnapping of the British ambassador to Uruguay, where the motive appears to have been a determined desire by the Tupamaros organization, a young revolutionary group, to establish itself as the recognized second power within the State. The remarkable self-control displayed by the Ambassador throughout his eight months of captivity seems somewhat to have disconcerted his captors, despite their success in keeping his whereabouts concealed. But it is as well to recall that a kidnapping operation could also be the expression of something more fundamental still, a violation of law in pursuit of a doctrinal 'war of nerves', described by the Brazilian terrorist Carlos Marighela in the following words: 'The object of the war of nerves is to misinform, spreading lies among the authorities—thus creating an air of nervousness, discredit, insecurity, uncertainty and concern on the part of the Government'.

17.31 It should be clear from the above that diplomatic kidnapping, although an event concerning international diplomacy, is not amenable to diplomatic method as between, for instance, the government employing the kidnapped diplomat and

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7 E Denza, *Diplomatic Law* (3rd edn, 2008).

8 For an account from his wife's perspective of his ordeal see K Hickman, *Daughters of Britannia* (Flamingo, 2000) 247–9.

9 Sources include *Political Kidnappings,* Committee on Internal Security. US House of Representatives, 93rd Congress, 1 August 1973, and Professor C E Baumann, *The Diplomatic Kidnappings* (The Hague, 1973).

the kidnappers. The victim government will indeed use the diplomatic channel to urge a government in whose territory a diplomatic kidnapping takes place to intensify its search for kidnappers and kidnapped and to assure better protection in the future. But any 'negotiation' should be between the territorial government and the kidnappers. If the diplomat's sending State embarked on its own direct negotiations with the kidnappers, this could be resented by the territorial government as an intervention in an affair which was its responsibility.

17.32 The use of diplomatic kidnappings was frequently successful, notably in Brazil where, for instance, the release of the Swiss ambassador, M. Giovanni Enrico Bucher, kidnapped in December 1970, was eventually purchased, after a month and a half of negotiation, by the release of no less than 70 'political prisoners'. (The Brazilian government had already accepted the release of political prisoners in two previous diplomatic kidnapping cases.) Underlying the governmental decisions in these cases was the fundamental political and ethical question as to whether the paramount consideration was to preserve the life of a human being, or to discourage recurrent kidnapping by refusing to accede to the kidnappers' demands. A life would inevitably be risked by a refusal to pay the price demanded. A very interesting comment on this, quoted by Professor Baumann,[10] was made by Mr Burke Elbrick at a press conference after his release, when he said that, although such restraint would have resulted in his own 'disappearance from the scene', it would in general be unwise for a government to negotiate with terrorists and to give in to any of their demands. Sir Geoffrey Jackson, who had suspected that the Tupamaros might seek to kidnap him, had made it clear in advance to the British government that he did not wish to be ransomed. Knowledge of this by his captors may have helped to save his life. It became subsequently clear that a collective robust line from Western governments in refusing to bow to illegal demands from hostage-takers greatly reduced the incidence of kidnapping of diplomats (see Chapter **9**, paragraph **9**.9). Where governments took a weaker line with kidnappers or were willing to do deals with governments which had influence over the kidnappers to see their citizens released (as happened in the mid to late 1980s when there was a spate of hostage-taking in Beirut), there was a corresponding increase in those being taken hostage.

17.33 The Federal German government for a number of years took the opposite view. But having paid very heavily for the release in March 1975 of the eminent Berlin political leader, Herr Peter Lorenz, they seemed to have changed their minds by the time of the violent attack on the German embassy in Stockholm on

10 Baumann, *Diplomatic Kidnappings*.

17 April 1975, when they decided that the moment had come to fight it out.[11] To some extent this was in response to collective pressure from friendly States.

17.34 Although, therefore, diplomats are deeply concerned in this aspect of terrorism, since any one of them might suddenly become a victim, diplomatic activity as such remains that of seeking to persuade governments in countries where kidnapping has taken place to act in accordance with the wishes of the victim government. This was most demonstrably not carried out at the time of the siege of the Japanese embassy in Lima in 1996 (see Chapter **8**, paragraph **8**.15 above) although in the light of the success of the rescue operation Japan made no formal protest. The wishes of the victim government do not always align themselves with the victims themselves who must in their minds always be balancing the desirability of being rescued with the high risk usually involved in the attempted rescue. They will naturally be fearful of being killed during the rescue attempt or by retribution at the hands of the terrorists/kidnappers/hostage-takers. Failed attempts do not always impact on the hostages. The fallout from the failure of the attempt to rescue the US embassy personnel in Tehran was largely political and the damage was done to the Carter administration (see paragraph **17**.21).

17.35 Although each case is individual there are certain actions which involve diplomatic procedures. First, it has to be accepted that as terrorism is increasingly global, security precautions need to be reviewed regularly and tightened up as appropriate in all countries receiving diplomatic and consular missions. There can be no mathematical rule of thumb about this. For instance, some receiving countries are more vulnerable to terrorist attack than others if they hold in prison persons who can be described credibly, whether correctly or misleadingly, as political prisoners. Experience is at best an uncertain guide in any attempt to forecast the occurrence of an attack on a mission or a kidnapping, or its timing; though reasonably good intelligence about the strength, vitality, and mutual relationships of terrorist groups will obviously be helpful. In this context, a State with an effectively repressive regime is more likely to be able (if willing) to control access to embassies than a freer regime.

17.36 Although it remains the duty of the receiving Power to protect the lives of members of diplomatic missions and of course the missions themselves, security forces are often—owing to the considerable rise in terrorist and criminal activity in recent years—too tightly stretched to give the diplomatic community the full protection that the threat warrants. The receiving Power, in these circumstances,

[11] The nature of the dilemma in which German public opinion and the German authorities themselves had been placed by the activities of violent revolutionaries is described by M J Lasky in 'Ulrike Meinhof and the Baader-Meinhof gang' *Encounter* (June 1975).

can reasonably expect all missions to take measures to protect themselves and there is a self-serving responsibility on diplomats themselves to take reasonable precautions. Some missions on occasion employ armed security guards, but a number of countries object to arms being carried officially within their territory by anyone other than their own security forces. Where possible, therefore, armed intervention against terrorists should be left to the receiving Power, which should of course have the means to intervene quickly and effectively against armed terrorists attacking diplomatic missions.

17.37 Some countries, especially those which feel themselves threatened, have adopted what are now well-known defensive precautions. Their embassies have often been turned into fortresses where access is heavily controlled and sometimes discouraged. Moreover, apart from reinforcement of security personnel, there are variations of times and routes of official (increasingly armoured) cars (a notably vulnerable target), temporary abandonment of official flags and number plates, and the use of cars of any colour provided it is not black. But these useful secondary measures in turn have their limitations. For instance, depending on relative locations there may be very limited possibilities of varying the route taken between residence and office, and a determined group can sometimes rush the defences. By and large, however diplomatic kidnapping has now become extremely rare as governments both of the sending and of the host State have invested, in many cases substantially, in physical security measures. Those countries whose diplomats are seen to be most at risk (eg the US, UK, Israel, Turkey) have unsurprisingly invested the most. Sometimes there is a displacement risk where one diplomat is so well protected that a terrorist group will target someone from the same or another mission considered more vulnerable. It was thought that Brigadier Saunders may have been murdered in Athens (see paragraph **17**.25 above) because his US opposite number, the original target, was too well protected. Similarly in the case of Roger Short (see paragraph **17**.24 above), he may well have been targeted because the US consul-general in Istanbul had recently moved to a purpose-built post on the top of a hill overlooking the Bosphorus.

17.38 There is little doubt that, at least for al-Qaeda, the UN represents as high a value target as the representatives of those nations most at risk mentioned in the previous paragraph. However, unlike those nations, and despite the murderous suicide-bombing of its headquarters in Iraq and Algeria the UN appears to lack the capacity and funds to offer the same level of protection to its staff. For example, in mid-December 2008, Bob Fowler, the UN secretary-general's special envoy to Niger (former Canadian deputy minister of defence, ambassador to the UN and Italy), together with his assistant, Louis Guay (former ambassador to Gabon), and their UN driver, were captured by 'Al Qaeda in the Islamic Maghreb' (AQIM) on the outskirts of Niamey, and held for four and a half months in the

remoteness of the Sahara desert. While Fowler is the first under-secretary-level UN employee to be kidnapped, with well over 50,000 employees worldwide, given the security threat, the UN face a challenge in continuing to recruit and retain high-quality staff.

The Legal Position

17.39 Diplomatic agents and premises as explained in detail in Chapters **8** and **9** above enjoy inviolability under customary international law, which was codified in the Vienna Convention on Diplomatic Relations of 1961. The receiving State is under a special duty to take all appropriate steps to prevent any attack on the person, freedom, and dignity of diplomats and to protect diplomatic premises.[12] International cooperation is clearly essential both in the prevention of crimes against diplomats and in the punishment of offenders. To this end, it was felt increasingly desirable to conclude an international convention (similar to those on hijacking and sabotage of aircraft) concerning legal measures aimed at the prevention and punishment of crimes against diplomats.[13] The Organization of American States adopted a regional convention on the subject in 1971, and later that year the United Nations General Assembly asked the International Law Commission to prepare draft articles. On the basis of the Commission's draft, the Sixth (Legal) Committee of the Assembly elaborated the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly in 1973.

17.40 This Convention,[14] which entered into force in 1977, provides that persons alleged to have committed certain attacks against diplomatic agents and other internationally protected persons should either be extradited or have their case submitted to the authorities of the State Party where they are, for the purpose of prosecution. It contains, in addition, provisions concerning cooperation, the transmission of information, and the treatment to be accorded to alleged offenders. However extradition could still be refused on the traditional, but increasingly discredited, ground of the so-called 'political' character of the alleged offence.

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12 See Chapters **8** and **9** above.

13 UKTS No 3 (1980). See Wood in (1974) 23 ICLQ 791. This desire was intensified by the kidnapping of James Cross in Canada (see paragraph **17**.29). A fascinating account of this episode, with all the complexities of a situation in which a federal government and a state government were dealing simultaneously with more than one terrorist group, will be found in Baumann, n 9 above, Ch VII, 111–38.

14 Cmnd 6176; 13 ILM (1974) 41.

17.41 The European Convention on the Suppression of Terrorism, adopted in 1977 by Member States of the Council of Europe, imposes an obligation on Contracting States not to regard specified offences (including crimes against internationally protected persons) as political offences for the purpose of extradition. (The Convention has been replaced in so far as it relates to extradition procedures as between Member States of the European Union by the tough provisions of the European Arrest Warrant.[15] Bilateral arrangements, for instance between the United Kingdom and India and the United States, and between the United States and India and Jordan, nowadays make similar provision.

General

17.42 Attacks on diplomatic and consular missions and on diplomats are attacks on institutions which on the one hand enjoy inviolability under international law but on the other offer attractive targets simply because of their representative character. There can be no *a priori* definition of procedure to be applied if such attacks take place, although experience has shown that capitulation leads only to an escalation in terrorist demands. The only way to work out any guidance on best practice is by taking examples and deducing from them such general advice as one can.

17.43 Some of the attacks described above imply an aroused public— aroused possibly by the receiving government—as well as a degree of political instability. In a stable situation, these incidents should not arise; if they are at all likely to do so, police protection should, in accordance with international law and practice, be available and sufficient.

17.44 In an unstable political situation, an alert and well-informed mission in days gone by should have been able to sense when disorder and perhaps violence were to be expected. Global terrorism makes such anticipation very much more difficult. Where there are such cases, a request in advance to the government of the receiving State for special protection is a wise precaution in itself, and will strengthen the position of the mission and the sending government in any later argument about restitution. If there is prolonged disturbance or civil conflict, the mission will probably ask its own government for enhanced security or other special assistance.

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[15] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA [2002] OJ L190/1). Also M C Wood, 'The European Convention on the Suppression of Terrorism' (1981) *Yearbook of European Law* 307. UKTS No 93 (1978).

17.45 Whatever doubts there may be about facts and causes, it is reasonable for the 'victim' government to take the position that the local government (whether the established one or a new one) should accept responsibility for any failure in the duty to protect diplomatic premises, and also responsibility for paying compensation. As shown in many of the cases described above, there is an overwhelming body of international practice in which—at least after passions have cooled—full compensation is paid by receiving States irrespective of fault for damage sustained by foreign embassies and injuries received by diplomatic personnel.

17.46 It is in any case wise diplomacy for an official request to be addressed immediately after the attack to the host government on behalf of the victim government to assure effective protection both for the official representation of the victim country, and for its local community. The right to claim compensation should also at once be reasserted even where the host government is as much a victim as the diplomatic mission, eg an attack by a suicide bomber which kills local staff working in the foreign mission, or simply bystanders, or both as in the attack on the British consulate-general in Istanbul (see paragraph **17**.24 above). This kind of diplomatic action should be taken without delay (ie without waiting for instructions) by the mission affected.[16] In the case of the burning of the British embassy in Beijing this was done by the British chargé d'affaires, who in the absence of other facilities sent a letter typed by himself through the ordinary post.

17.47 Experience points to the great value in such cases of good working relationships between the missions of countries friendly to each other in the wider context. These would naturally include fellow-members of political organizations pursuing similar policies, such as the Member States of the EU, NATO, the Commonwealth, or regional groups such as the Organization of American States and the African Union. Each individual country must be cautious of involving itself politically in the causes leading to violent attacks. But where the threat is not against one mission only, collective representations may be more effective than representations by one ambassador only. These may be led by the Doyen of the Diplomatic Corps (see Chapter **14** above) or in more political cases by the ambassador of the State holding the presidency of the European Union (see Chapter **27** below) on behalf of EU Member States. A certain diplomatic *camaraderie* can develop in such circumstances; and this can be very helpful in a situation which can often be extremely frightening and dangerous.

[16] The question whether this immediate request should be made on instructions or on the responsibility of the head of mission may well depend on the possibility of immediate telephone communication with his own foreign ministry; if there is any doubt about this at all, immediate action by the head of mission is desirable.

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Book V

CONSULAR MATTERS

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18

THE APPOINTMENT OF CONSULS

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Consuls have over recent decades become closely assimilated to diplomats in the manner of their appointment and in many of the functions they perform, though not in the methods whereby they carry out these functions. The origins and history of consuls and consular posts are however quite distinct from those of diplomats and diplomatic missions. In modern practice, consuls are appointed by the government of a State to protect the practical, legal, and commercial interests of its own nationals in another State, and their contacts for this purpose with the host State are with regional, local, or police authorities rather than with the ministry of foreign affairs or other departments of central government. **18.1**

Historical Background

The ancient Greek city states applied a system under which foreigners living in Greece were permitted to choose representatives to act as intermediaries between them and local Greek authorities. Greek settlers in Egypt and elsewhere were from the sixth century BC permitted a similar privilege. In the third century BC Rome created the post of *praetor peregrinus* to deal with disputes between foreigners, or between foreigners and Roman citizens, by applying the *ius gentium* (law of nations) which covered both foreign laws and commercial practice. Comparable appointments, for which the term 'consul' came to be used, were devised in Byzantium. Their holders were authorized in the twelfth century to try criminal and civil cases involving Venetians in Constantinople, and later those involving Genoese and French. It was in Constantinople that consular **18.2**

work as we understand it today had its real beginnings. At first it was for the most part a judicial responsibility for the foreign merchant community exercised by local residents specially appointed for the purpose. Later, *consules missi,* the first of whom were probably Venetians, were appointed and sent from abroad to perform the same function. Following the Crusades, arrangements of this kind proved their usefulness in other parts of the Mediterranean and the Near East, as well as in France, Spain, and Italy. The function of *juges consuls* and *consuls marchands* was at first to arbitrate in commercial disputes. In due course it became customary for them to exercise criminal as well as civil jurisdiction over merchants of their own nationality. After the fall of Constantinople in 1453, Byzantium on the basis of Treaties of Capitulations continued to allow Genoa, Venice, France, and other Christian countries to appoint consuls having civil and criminal jurisdiction over their own nationals resident there. A similar system operated in China long before the opening of China to the West in the nineteenth century.

18.3 In the sixteenth century consuls began to be despatched by national governments, but as representatives of their countries on the national plane they were soon overshadowed by diplomatic missions. Two hundred years later, with the expansion of industry and maritime trade, the usefulness and the separate character of consular functions was reasserted. Commercial and consular treaties and national legislation began to make precise provision for consular functions, privileges, and immunities. A Treaty concluded in 1860 between the United Kingdom and France was based on the principle of free trade and included a 'most-favoured-nation clause' ensuring that privileges given by either party to other States were automatically extended to the other party, and treaties on commerce and navigation on similar lines became widespread. In part through this mechanism, a greater uniformity was gradually established in regard to consular functions and privileges.

18.4 From the middle of the nineteenth century, a system of extraterritorial privileges was established between Asian and Western Powers. Under this system, China, Siam (now Thailand), and Japan by treaty or concession granted nationals of particular Western States exemption from territorial jurisdiction and they were subject to the laws and judicial administration of their own home State—in practice to the jurisdiction of their own consular courts. Extraterritorial concessions were also granted by other—mainly Muslim—States. Extraterritorial rights—clearly incompatible with the sovereign equality of States since they were granted on a non-reciprocal basis—were gradually abolished over the first part of the twentieth century. But even as late as 1952 the United States argued before the International Court of Justice that its rights under a Capitulations Treaty of 1836 to exercise consular jurisdiction over its own nationals in Morocco persisted even

following the establishment of a French Protectorate over Morocco.[1] Even though capitulations and extraterritorial rights have formally been abolished, vestiges of the old system persist—particularly in regard to shipping matters.

18.5 During the early twentieth century, consular relations, privileges, and immunities were governed by a very limited number of rules of customary international law, by a large network of bilateral consular conventions, and by a few regional conventions such as the Havana Convention of 1928. The Harvard Research Draft of 1932 on the legal position and functions of consuls (1932), based on detailed research into practice, provided a useful basis for the Draft Articles on Consular Intercourse and Immunities submitted in 1957 by Zourek, as Special Rapporteur, to the UN International Law Commission and those in turn formed the starting point for the UN Conference which in 1963 adopted the Vienna Convention on Consular Relations.[2] This Convention, like its predecessor the 1961 Vienna Convention on Diplomatic Relations, is now central to international practice. But in comparison to the Diplomatic Convention the provisions of the Consular Convention were less a codification of long-established rules and more progressive development, and the régime it sets out is less uniformly applied. Article 73 of the 1963 Convention permits existing bilateral consular treaties to be kept in force and allows parties to the Convention to conclude new 'international agreements confirming or supplementing or extending or amplifying the provisions thereof'. Parties to the Convention—of which there were 171 in 2008—have taken full advantage of this provision. In the early years of the Convention's operation, for example, bilateral agreements with and between Communist States systematically granted a higher level of personal immunity to consuls.

Consular Relations and Consular Posts

18.6 Article 2 of the Vienna Consular Convention provides that consular relations between States take place by mutual consent and that consent to diplomatic relations implies, unless otherwise stated, consent to consular relations. As already noted in Chapter **16**, paragraph **16.**13, it is possible for States to establish or to remain in consular relations without also being in diplomatic relations.

18.7 Individual consular posts may however be established only with the consent of the receiving State. Article 4.2 specifies that the seat of each consular post, its

[1] *Case concerning Rights of Nationals of the United States of America in Morocco (France v US)* 1952 ICJ Reports 176. For an account of the extraterritoriality system, see L T Lee and J B Quigley, *Consular Law and Practice* (Oxford University Press, 2008) at 7–16.

[2] 596 UNTS 261.

classification, and the consular district all require the consent of the receiving State, and a change in any of these elements also requires approval. Consular work in the capital is in fact often carried out by a consular section of the embassy, and as both Vienna Conventions make clear, it may be carried out by diplomatic staff. In order to combine flexibility with economy many governments have now unified their diplomatic and consular services administratively in a single overseas service, making it possible for an officer to hold diplomatic or consular appointments alternatively or concurrently, as circumstances may require. An officer may for example hold at one time dual posts as counsellor and consul-general, or as first secretary and consul.

18.8 As discussed in Chapter **16,** the severance of diplomatic relations need not automatically lead to a breach in consular relations, and consular relations may be established as a precursor of full diplomatic relations. Consular functions may also be carried out on behalf of a State which has no permanent mission in another State by a third State as protecting Power and by officers within the Interests Section of the embassy of that Power. Where however either the sending or the receiving State does not recognize the other as a State or does not recognize its government, it is legally possible for existing consular relations to continue because of the fact that the consul deals not with the government but with regional or local authorities. The United Kingdom, for example, continued to maintain a consular post in Taiwan after its recognition in 1950 of the government of the People's Republic of China, and in Hanoi, where it did not recognize North Vietnam as a State. The United States also sought to maintain its consulate in Hanoi, but in their case the Vietminh authorities refused to recognize it on the ground that it violated the sovereignty of the Democratic Republic of Vietnam and it was closed a year later. There are however in the absence of mutual recognition specific problems in establishing initial consular relations or posts and in replacing the head of a consular post because of the normal practice whereby the head of post is admitted to the exercise of his functions by an authorization from the receiving State usually described as an *exequatur*. This is set out in Articles 11 and 12 of the Vienna Consular Convention which make clear that the head of a consular post is to be provided by the sending State with a Commission or similar instrument which is transmitted through the diplomatic channel and normally leads to issue of an *exequatur* by the receiving State. Clearly this procedure cannot be carried out in the absence of recognition or of diplomatic relations. In the cases of Taiwan and Hanoi, the UK government simply made fresh consular appointments without any request for an *exequatur*. A similar procedure has been followed by a number of States following the invasion of Northern Cyprus by Turkey and the establishment of the Turkish Republic of Northern Cyprus—generally unrecognized as a State. The United States, the United Kingdom,

Germany, and others provide services to their own nationals in Northern Cyprus through consular offices based in the Turkish sector of Nicosia, without seeking *exequaturs* either from Turkey or from the Turkish Republic of Northern Cyprus.[3] Such a device however requires at least the passive acquiescence of the authorities of the receiving State in order to succeed, and whether this is forthcoming will depend on political considerations.

18.9 As a general rule it is necessary to be recognized as a State in order to establish or maintain consular posts abroad. A special case is the Hong Kong Special Administrative Region which, though not claiming to be a State, has by virtue of the Sino-British Joint Declaration of 1984 a high degree of autonomy and in particular the right to independent conduct of its foreign trade and commercial affairs. The Joint Declaration envisaged the establishment of official Hong Kong delegations in foreign countries performing a limited range of commercial consular functions and headed by a Commissioner. The Hong Kong government now operates in places such as Brussels, London, Geneva, Washington, New York, and Tokyo with economic and trade offices (ETOs) carrying out functions of trade promotion and assistance for inward investment in Hong Kong. Because Hong Kong is not a State or a party to the Vienna Convention on Consular Relations it is necessary for special provision for its status, privileges, and immunities to be made in the national laws of States receiving ETOs, either by specific legislation or in some cases on an administrative basis.[4]

Consular Titles and Appointment

18.10 Consuls are divided into two broad categories: career consuls and honorary consuls. The first contains three classes: consuls-general, consuls, and vice-consuls. Other titles have been used, but are liable to give rise to dispute or not be recognized. Career consuls are generally nationals of the sending State and are salaried, career government servants. Under Article 57 of the Vienna Consular Convention they are debarred from carrying on for personal profit any professional or commercial activity in the receiving State. Honorary consuls may also be appointed in any of the three classes mentioned above. The title of consular agent is generally used in state practice to describe an honorary consul. An honorary consul is usually a local resident in the receiving State with business interests of his own, or some other private occupation. He may have no previous consular experience

[3] Lee and Quigley, *Consular Law and Practice*, 102.

[4] See statement by the Minister of State, Foreign and Commonwealth Office, introducing the Hong Kong Economic and Trade Office Bill to provide for the status of ETOs in the UK, Hansard HC Debs. 31 October 1996, cols 795–7.

or training. It is generally thought preferable that he should be a national of the sending State, but appointments of persons holding dual nationality of sending and receiving States are common, and Scandinavian, South American, and indeed many small States with far-flung interests freely appoint foreign nationals as honorary consuls. But as with diplomatic agents, the express consent of the receiving State is under Article 22 of the Vienna Consular Convention necessary for the appointment of a national of the receiving State (including dual nationals). Honorary consuls perform only limited duties and will receive fees, or an expense allowance, instead of a regular government salary. They may be appointed by the head of the ministry of foreign affairs of the sending State and they may be placed under the supervision of another consular post headed by a career consular officer. The distinction between career and honorary consuls—which as explained in the following chapter is important in regard to status, privileges, and immunities—is not straightforward and there are variations in national practice and sometimes differences between States over the matter.[5]

18.11 Under Article 11 of the Vienna Consular Convention, the head of a consular post must be provided by the sending State with a document, usually termed a Commission, which certifies his appointment and category as well as the consular district and the seat of the consular post. This document is transmitted to the government of the receiving State through the diplomatic or other appropriate channel. In contrast to the position for the head of a diplomatic mission it is not necessary under international practice or under the Vienna Consular Convention to seek advance approval for a named individual, although some treaties—in particular those concluded by the Soviet Union and later by Russia—made provision for this. Under Article 12 the head of the consular post is admitted to the exercise of his functions by an authorization from the receiving State usually called an *exequatur.* This may take whatever form the practice or regulations of the receiving State prescribe. The date of the grant of the *exequatur*, or the date on which the officer is provisionally admitted to the exercise of his functions, if this is earlier, determines his seniority in each class of the local consular corps.

18.12 Members of the consular staff, other than the head of post, may be freely appointed by the sending State, but their names, categories, and class must be notified to the receiving State. The practice of some States is that members of consular staffs should also receive *exequaturs,* although this is not required by the Vienna Convention. In most capitals it is sufficient for notification of new consular appointments to be made on a prescribed form.

[5] For more detail on the distinction as applied in practice, see Lee and Quigley, *Consular Law and Practice*, at 32–7 and 505–28.

18.13 The receiving State may, upon notice of the intention to appoint a consular officer, refuse to grant an *exequatur.* As in the parallel case of refusal of *agrément* for the head of a diplomatic mission, the receiving State is under no obligation to give reasons. Enquiries even in private are generally avoided, since any statement of reasons is liable to cause friction. Under Article 23 of the Vienna Consular Convention the receiving State may at any time declare a consular officer to be *persona non grata,* whereupon it is normal for his government to recall him. The procedures and practices for such an eventuality are the same as those applied under Article 9 of the Vienna Convention on Diplomatic Relations when a diplomatic agent is declared *persona non grata* or another member of the mission declared unacceptable.[6]

18.14 While consular functions are carried out by the head of the consular post and other consular officers, administrative and technical services for the post are provided by consular employees. Domestic services such as cooking, cleaning, gardening, driving, and security protection are provided by the members of the service staff. All those are members of the consular post. Those employed privately by any member of the consular post are termed members of the private staff, and they are not themselves members of the consular post.

18.15 The size of consular staffs may under Article 20 of the Vienna Consular Convention be required by the receiving State to be kept within limits considered by it to be reasonable and normal, having regard to circumstances and to the needs of the particular post. A small, new, or developing State may find it administratively embarrassing to cope with an inflated corps of foreign officials in its territory; and if the staffs of foreign representations proliferate without apparent reason, it is legitimate to wonder what they are all up to. The Ethiopian government, for instance, in 1935 voiced its objection at the League of Nations Assembly to Italy stationing a consul with a guard 90-strong in a place where there were no Italian nationals, and suggested that this was not only an abuse of privilege but was also aimed at the penetration and invasion of Ethiopia. In 1961, owing to the sharply deteriorating diplomatic situation, the Cuban government called upon the United States for the mutual reduction, within 48 hours, of diplomatic and consular staff to 11 in the respective capitals. The United States embassy and consulate in Havana employed 300 and had been issuing thousands of visas every month for entry into the United States. The Cuban request was, however, overtaken by a general rupture of relations.

18.16 As to the 'needs' of a particular post there are often differences as to what numbers are required by circumstances. These circumstances will include the number of

[6] See Chapter **15**, paragraph **15.11**.

foreign residents, students, visitors, tourists, businessmen, and ships for which the consulate may have to provide services, as well as the proximity of other consular posts of the sending State. A concept developed by the Soviet Union and applied by other mainly Communist States was that of parity of representation—both as to the number of posts and the number of staff within them, but this notion is now largely discredited as being inappropriate to the proper justification for the maintenance of overseas consular representation. The practices developed within the context of Article 11 of the Vienna Convention on Diplomatic Relations may be applied with due regard to the differences in purposes and functions of diplomatic and consular posts. Where ceilings are called for or unilaterally imposed for wider political reasons—for example against the Soviet Union during the Cold War—they are likely to be applied to both diplomatic and consular missions.

End of Consular Functions

18.17 Chapter **15** described the circumstances in which a diplomatic mission is terminated or withdrawn and the legal framework applicable to each of those cases. Many of those circumstances and legal rules apply also to consular posts, consular officers, and other members of a consular post, although most of the formal and protocol rules do not apply and the terminology is different. There is, for example, no procedure for the appointment of a *chargé d'affaires ad interim* as head of a consular post and it is most unusual to send a consul on a special mission. Article 25 of the Vienna Consular Convention provides that the functions of a member of a consular post come to an end on notification to that effect by the sending to the receiving State, on withdrawal by the receiving State of the *exequatur* (for the head of post) or on notification by the receiving State (for others) that it has ceased to consider them as members of the consular staff. The functions of a member of a consular post however also terminate if the consular post is recalled whether on a temporary or a permanent basis, if consular relations are severed or on the disappearance of the sending or the receiving State.

18.18 Article 26 of the Vienna Consular Convention imposes obligations on the receiving State to grant, even in case of armed conflict, facilities for departure to members of the consular post and members of the private staff (other than nationals of the receiving State) as well as their families. It is closely based on Article 44 of the Vienna Convention on Diplomatic Relations, but resolves some ambiguities in the latter provision. The Consular Convention includes the grant of time and facilities to prepare for departure, and the right to export property does not extend to property whose export was prohibited at the time of departure.

18.19 Temporary or permanent closure of an entire consular post, and total severance of consular relations between sending and receiving States are regulated under

Article 27 of the Vienna Consular Convention. This is closely based on Article 45 of the Vienna Convention on Diplomatic Relations, but with the important difference that where a consular post is closed without severance of consular relations and the sending State has no diplomatic mission in the receiving State, provision is made for the protection of premises, property, and archives by another consular post of the sending State in the receiving State. The protecting consulate may—but only with the consent of the receiving State—also take over the exercise of consular functions in the district of the post which has been closed. The requirement for the receiving state to respect and protect consular premises and archives where consular relations are severed, and the possibility of entrusting premises, property, and archives as well as protection of interests to a protecting State acceptable to the receiving State apply as in the case of closure of a diplomatic mission under the Vienna Convention on Diplomatic Relations.

18.20 The provision of consular services by one state on behalf of another is common among countries of the Commonwealth. The United Kingdom, Canada, and Australia, with extensive overseas consular representation, have for many years carried out consular functions on behalf of smaller Commonwealth states, and there are also arrangements between Canada and Australia for the provision by each of consular services on behalf of the other in places where one maintains a consular post while the other does not.[7] Among Member States of the European Union, one aspect of the concept of citizenship of the European Union, established by the Treaty on European Union as amended by the Maastricht Treaty in 1993, was common diplomatic and consular protection arrangements for citizens of the European Union in third countries. This was given effect by a Decision of the Representatives of the Governments of the Member States meeting within the Council, which provides in Article 1 that

> [e]very citizen of the European Union is entitled to the consular protection of any Member State's diplomatic or consular representation if, in the place in which he is located, his own State or another State representing it on a permanent basis has no:
> - accessible permanent representation; or
> - accessible Honorary Consul competent for such matters.

On proof of nationality, diplomatic and consular representations are required to treat a person seeking help as if he were one of their own nationals.[8] A further Decision sets out detailed implementing rules to give effect to these responsibilities in regard to consular matters.

[7] Exchange of Notes concerning the Sharing of Consular Services between the Ministers for External Affairs of Canada and Australia, Vancouver, 7 August 1986.

[8] Decision 95/553/EC, OJ 28.12.95.

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19

FUNCTIONS, PRIVILEGES, AND IMMUNITIES OF CONSULS

Consular Protection	19.6	**The Vienna Convention on Consular Relations**	19.15
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19.1 Although as explained in the previous chapter the historical origins, the titles, and the status of consuls are different from those of diplomats, the distinction between the functions of consuls and those of diplomats is not clear cut. The essential difference between diplomatic and consular work is that, whereas the diplomat does business with or through the central government of the receiving State, the consul for the most part conducts official business only with local or municipal authorities. The nature of the individual consul's work varies to a much greater degree, as between different posts, than that of the individual diplomat. A consul in a busy port, for example, may do little else but shipping work; whereas in another place he may be concerned mostly with problems created by his fellow nationals in the receiving State as migrant workers, pilgrims, or tourists. Overall, however, it is the function of protection, in its broadest sense, which is the most important consular function, whereas in the case of diplomats the protective function is normally of less importance than the other major functions of negotiating with the receiving State and reporting to the sending State. Of course a consul is concerned with the furtherance of his country's interests and with the maintenance of satisfactory relations between his country and others, but in practical, day-to-day working terms rather than in the political sphere. His functions quite often overlap with those of the diplomat in the embassy, but they are carried out at a different level and in a different way.

19.2 The distinction is perhaps most easily understood by contrasting the different aspects of the same matter which would fall to the consular and to the diplomatic

post. If, for example, a national of the sending State is arrested, it falls to the local consul on being notified of the arrest, to visit him in prison, advise him how best to protect his interests, notify his relatives if he requests it, put him in touch with a local lawyer and an interpreter, attend any criminal proceedings, and perhaps repatriate him if he finds himself released without any funds. But if he complains that he has been held for several months without any charge being brought, or that he has been brutally treated by the police, and that there is no form of legal redress open to him, then it is likely that the embassy will under its powers of diplomatic protection be called upon to make representations on his behalf to the ministry of foreign affairs. If a merchant ship is detained in a local port because the crew are refusing to work until their arrears of wages are paid, or because the local police wish to conduct an investigation into some minor offence which is alleged to have happened on the vessel, it is for the consul to give assistance to try to settle the dispute, or to persuade the local authorities that proceedings in respect of the offence can better be taken when the ship has returned to its home port. But if such matters are causing repeated difficulty, it may be desired to negotiate a consular or a shipping agreement between the sending and receiving States so as to reduce difficulty in the future, and this function will be carried out through the embassy which may propose negotiations to the ministry of foreign affairs. The diplomat protects his nationals in the general or collective sense or where some major issue of principle or possible breach of international law is involved, while the consul gives protection and practical assistance to individuals in a particular case.

19.3 One distinction which was formerly made between diplomatic and consular work was that the promotion of trade and commerce between the two countries was exclusively a function of the consul. It is true that the Vienna Convention on Diplomatic Relations describes among the functions of a diplomatic mission the developing of 'economic' relations, whereas Article 5 of the Vienna Convention on Consular Relations lists among consular functions 'furthering the development of commercial, economic, cultural and scientific relations'. But now that the promotion of exports and the development of good trading relations is essential for the economic development of all countries, and indeed for the survival of some, a clear distinction can no longer be drawn between 'economic' and 'commercial' work. As a rule, of course, intergovernmental negotiation on general trading matters falls to the embassy, while it is the consul who, in his area, will give advice to the particular businessman who wants to meet local contacts such as chambers of commerce or trade associations with a view to exporting his goods or setting up a local branch of his firm. (In the capital this will be done by the commercial department of the embassy.) But where the deal is of major national importance—for example the sale of Concordes to Iranair, fighter aircraft to

Saudi Arabia, or Spey engines to China from the United Kingdom—the embassy will always be closely involved. Once again the distinction between the diplomatic and the consular function comes down to the level at which contact is made with the authorities of the receiving State.

19.4 From an examination of a list of traditional consular functions, such as is contained in Article 5 of the Vienna Convention on Consular Relations or in the 1967 European Convention on Consular Functions[1]—which has never entered into force—it can be seen that, apart from the assisting of persons in trouble, reporting and political work, and the promotion of commercial interests, most are basically administrative or legal in character. Among the more important of these administrative functions are:

- issue of passports to nationals of the sending State and visas or other entry documents for others wishing to visit the sending State;
- authentication of documents required under the law of the sending or the receiving State; assistance with repatriation of the body; and on succession and export of property matters on the death of a resident or visitor who is a national of the sending State;
- transmission of various kinds of legal document such as service of process relating to actions begun in the sending State and commissions under which evidence may be taken by courts in the receiving State for use in the sending State; and
- registration of births and marriages in the receiving State of nationals of the sending State.

Most of these functions require some knowledge of the laws and regulations of the sending State and also those of the receiving State, although the difficult or unusual case may have to be referred home for instructions in the light of legal advice, and a local lawyer may have to be consulted on the law of the receiving State. Action following death of a visitor can be particularly sensitive: on one occasion the British consul in Innsbruck was left with responsibility for the body of a tourist who had suddenly died after his widow rejoined her coach tour and could not be contacted to give instructions for repatriation or burial.

19.5 No comprehensive list of consular functions can be drawn up. What functions any particular consul performs depend on two things—on the instructions given by the home State and on the laws of the receiving State. Consuls in certain cases (such as the representatives exchanged between countries in the Commonwealth)[2]

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1 Paris, 11 December 1967. European Treaty Series 61.

2 See Chapter **28** below.

may exercise a much more limited range of functions than is permitted under the local law or accepted under international law. They may, for example, be solely engaged in work relating to prospective immigration into the sending State—a task which may be politically and personally sensitive where for example it involves scrutiny of potentially sham marriages. No consul is entitled to exercise any function which is prohibited under local law, although it may be said that a prohibition which was so wide as to undermine the whole basis of the consular function, such as a prohibition on protecting the consul's own nationals, would probably lead to the breaking of consular relations. More extensive movement of people and modern means of transport have led to new functions in relation, for example, to commercial air services, refugees, child abduction, and forced marriages. Conversely, other functions may diminish in importance. Consuls are now less involved in shipping activities, for example, since local authorities acting under conventions drawn up within the framework of the International Maritime Organization perform many supervisory and safety functions and seafarer unions may deal with employment matters and disputes between crew and owners. Many States have found it useful to include in a bilateral consular convention a list of permissible consular functions—and indeed the list in Article 5 of the Vienna Convention on Consular Relations was drafted on the express wish of newly independent States setting up consular posts abroad for the first time—but such lists are never exclusive. Article 5 of the Vienna Consular Convention lists the most important consular functions expressly, but also authorizes consuls to perform 'any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State'. The list in Article 5 is reflected in the consular instructions to their overseas officers issued by many States.[3] Such national instructions, supplementing the training given to most consular officers before they are posted abroad, set out the legal framework and procedures for the discharge of each of their authorized functions.

Consular Protection

19.6 The most important of all the functions of a consul is that which heads the list set out in Article 5 of the Vienna Convention on Consular Relations: '[P]rotecting in the receiving State the interests of the sending State and of its nationals, both

[3] See L T Lee and J B Quigley, *Consular Law and Practice* (3rd edn, 2008) ch 7 on consular functions and chs 8–20 on specific consular functions.

individuals and bodies corporate, within the limits permitted by international law'. These last words were inserted at the instance of those States which recalled with resentment the period when the ill-treatment of nationals of an imperial Power might occasion the despatch of a gunboat or reprisals of a drastic kind. But they remain a useful reminder of the limits of the power of a consul, who must never in his zeal to protect his nationals transgress the local law or intervene in the internal affairs of the receiving State. Protection may involve assisting or repatriating the destitute and victims of robbery, settling disputes and administrative matters arising on visiting ships belonging to the sending State, visiting nationals in hospital if they are injured or become ill on holiday, helping them with their arrangements, and tracing the relatives of victims of an air disaster, storm, or flood in the receiving State. The growth in tourism and in casual travel by the young and impecunious has led to considerable increase in this kind of consular work. Over the past 20 years the United Kingdom has devoted much effort to limiting the need for consular assistance abroad through wide dissemination of information of what a British Consulate can and cannot do and provision of advice on how to avoid trouble.[4]

19.7 Before the consul becomes involved he will of course confirm that the person seeking assistance is one of his own nationals. Should the individual also possess the nationality of the receiving State, the consul may assist him or make informal representations on his behalf to the local authorities, but he is liable to find that his right to do so is challenged. The 'effective' nationality in such circumstances is that of the receiving State. Consular access and protection has become in recent years a matter of such practical importance and legal complexity that it is treated separately in the next chapter.

Reporting and Political Work

19.8 If the consular post is entrusted with reporting or political functions by the sending State, these functions (which do not form part of the traditional consular functions) are in ordinary circumstances exercised in a subordinate capacity to the embassy in the capital. Reports by provincial posts are normally sent to the ambassador or political section of the embassy and will cover any subject of interest to the embassy, whether it is the grass roots of politics, the pattern of agricultural

[4] See, for example, the leaflet distributed during the 1990s to all passport applicants 'Get it right before you go' and the information on the web (<http://www.fco.gov.uk>) about what consuls can do to help, as well as regularly updated travel advice for individual countries and downloadable consular publications on specific risks—all of these designed to encourage safer overseas travel.

development, or controversy over the building of a new research or nuclear facility. A report addressed to the ambassador may be transmitted, with the embassy's comments, to the home government. If it is addressed elsewhere, for example to the home ministry dealing with commercial or shipping affairs, it may be sent to the embassy under flying seal, so that diplomats there are aware of its contents.

19.9 In ordinary circumstances a consul does not exercise political functions in the broad sense, although a specific task may be delegated to him by the embassy. But there have been many occasions where the circumstances have been highly exceptional and the consul has had to assume a political role. A consul in a remote province or a district unresponsive to the central government may be directed to make political representation to the local civil or military administration. One celebrated case of a consul who found himself by force of circumstances in a political role of the greatest delicacy and importance was that of Bruce Lockhart who, originally despatched to Russia in a consular role, remained after the 1917 Revolution and the withdrawal of the British Embassy staff from Leningrad in charge of the unofficial relations which were maintained between Britain and the new Soviet government before recognition was accorded in 1921.[5] Daphne Park—later Baroness Park of Monmouth—as Consul-General in Hanoi between 1969 and 1970 in the absence of any recognition of North Vietnam by the UK (as explained in Chapter **18**, paragraph **18.**8 above) carried out diplomatic functions of considerable sensitivity in addition to the intelligence functions which became public knowledge only after her retirement. The United States, particularly because of its reluctance to recognize governments of which it does not approve, has often conducted business with unrecognized régimes through its consuls. Thus the United States Consul-General in Peking was instructed in 1950 to communicate with the authorities of the Chinese People's Republic, and in 1955 the United States Consul-General in Geneva was directed to negotiate with the Consul-General there of the Chinese People's Republic.[6] The Belgian Consul-General in Elizabethville (now Lubumbashi) was instructed to talk to President Tshombe at the time of the latter's secession from the new Republic of the Congo.[7] The assumption of a political role by a consul of course entails the acceptance of political risks, in particular that of expulsion on account of the expression of views or attitudes unacceptable to the receiving State.

19.10 A consul who continues to function where diplomatic relations are broken, or where the authorities in his consular area are not recognized by his government, does not necessarily assume any political functions at all. The United Kingdom

[5] R H B Lockhart, *Memoirs of a British Agent* (London, 1932).
[6] *New York Times,* 26 July 1955.
[7] *New York Times,* 11 January 1963.

retained a consul in Taiwan for a number of years after recognizing the government in Peking as the sole government of China, and this consul dealt only with the local provincial authorities and had no contact whatsoever with the authorities of the Nationalist government. The legal reasons for this were described in paragraph **18.**8 above.

Information and Trade Promotion

19.11 In trade and cultural promotion and in public relations exercises the consul will be expected to take his cue from the appropriate departments of his embassy, draw their attention to openings for new initiatives, and, at his discretion, take such initiatives himself. Ernest Bevin as Secretary of State after the Second World War circulated an instruction to the British Diplomatic Service to the effect that every member of it should regard himself as an information officer in addition to his other capacities. At that period, however, and indeed until the adoption of the Vienna Consular Convention, it was uncertain whether information was a proper consular activity, although it was of major importance throughout the Cold War. The consul will be expected to play a leading role in the community of his fellow nationals in the consular district, where he will be regarded as spokesman for his country's interests as well as a source of information and advice in times of difficulty. He will probably be an honorary member of his local chamber of commerce and he should be familiar with the local trade associations. His office may well, if the extent of business justifies it, contain a busy commercial section complementing that of the embassy. He will certainly be a useful colleague for the embassy's information officer, or press attaché. And he will be ready to help and advise the cultural attaché in the embassy, or, in the British service, the representative of the British Council. The consulate may contain an information section in the charge of an information officer with consular status. As it is not normally permissible to set up offices forming part of the diplomatic mission in localities other than the seat of government without the government's express consent, it is often convenient for an information officer in the provinces to work under the consular roof, where his status will assist the maintenance of direct contact with the public at large.

Privileges and Immunities

19.12 Under customary international law only the most limited immunities, and no privileges, were accorded to consular posts and to consuls. It could broadly be said that only those immunities were required which resulted from the rules of sovereign immunity. Thus the archives of a consulate were generally regarded as

inviolable, but this could equally be based on their character as archives of a foreign sovereign State. The consul was entitled to immunity in respect of his official acts only. Again these acts were performed as agent for a foreign State and so sovereign rather than consular immunity required that immunity should be accorded in respect of them. The consular premises were not treated as inviolable, consular bags did not enjoy the inviolable status of diplomatic bags, and consuls themselves enjoyed no personal immunity and were given taxation or customs privileges only by courtesy, if at all.[8]

19.13 After the Second World War an increasing number of States began to merge their consular and diplomatic services and to make greater use of career consuls, as opposed to honorary consuls who would be locally engaged and not subject to posting at the discretion of the sending State. The same individuals might therefore serve successively in a diplomatic and in a consular appointment. States which maintained extensive consular services abroad found that they would benefit overall from the institution of tax and customs privileges for consuls on a reciprocal basis. The need therefore came to be widely accepted to assimilate career consuls more closely to diplomats and since there was no basis for this in customary law, it was at first done by negotiation of an extensive network of bilateral consular conventions by the major States with substantial consular services. Most of those consular conventions moreover also contained important provisions regarding consular functions. The United Kingdom negotiated a Consular Convention with the United States in 1948 and subsequently concluded broadly similar conventions with 14 other States, mostly in Western Europe, before the Vienna Convention on Consular Relations was drawn up in 1963. These conventions accorded a very limited inviolability to consular premises and gave consuls no additional immunity or inviolability. Career consuls, however, were given extensive tax and customs privileges. Later conventions negotiated during the Cold War with Communist countries in Eastern Europe differed in that, in order to ensure a higher degree of protection, full diplomatic immunities and personal inviolability were conferred not only on consular officers and their families but also on junior staff and on private servants and their families. The United States concluded a similar network of agreements with Communist States, and agreements providing for privileges and immunities at the diplomatic level were also concluded among Communist States themselves.

19.14 These bilateral consular conventions remain of considerable practical importance, not only because of the provisions they contain in regard to consular functions, but because it was expressly provided in Article 73 of the Vienna Convention

[8] See W E Beckett, 'Consular Immunities' (1944) *BYIL* 34.

on Consular Relations that the provisions of the Convention should not affect other international agreements in force as between States Parties to them, and would not preclude States from concluding further agreements confirming, supplementing, extending, or amplifying its provisions. It was clear that the major States attached great importance to continuing their bilateral arrangements—in particular those with Communist States—and that support could not be found for the imposition of a uniform régime designed to supersede these arrangements. The network of consular conventions has indeed continued to grow, though more slowly, and for this reason an account of the provisions of the Vienna Convention does not in many cases provide a full answer to any question of entitlement to privileges or immunities. Even where both States are parties to the Vienna Convention the post must still check whether there is also a bilateral consular convention and if so consult it to learn the applicable rules. Where a bilateral convention accorded a lower standard of privilege or immunity, the United Kingdom proposed to its treaty partners that the Vienna scale of privilege or immunity should be accorded. This was accepted by all the other States concerned. The effect is that where the relevant bilateral convention and the Vienna Convention differ on any point, foreign consuls in the United Kingdom and United Kingdom consuls abroad are entitled to claim the higher of the two standards. They enjoy the higher immunities set out in the Vienna Convention and the higher tax privileges specified in the bilateral consular conventions.

The Vienna Convention on Consular Relations

19.15 It would not be justified in a book primarily concerned with diplomatic practice to examine the Vienna Convention on Consular Relations in detail.[9] A brief account of the provisions of the Convention regarding privileges and immunities will be given, and this will emphasize those points on which the privileges or immunities accorded by the Vienna Consular Convention differ from those accorded under the Vienna Diplomatic Convention. The negotiators at the Vienna Conference on Consular Relations in 1963 were heavily influenced by the text of the Vienna Convention on Diplomatic Relations of 1961. Many provisions in the Consular Convention were lifted without change or with only small changes from the Diplomatic Convention and where this is so, it is usually helpful to refer back to the explanation or discussion of the same provision in the diplomatic context. Article 28 of the Vienna Consular Convention on facilities for the work of the consular post and Article 30 on assistance with acquiring

[9] For a comprehensive and up-to-date account, see Lee and Quigley, *Consular Law and Practice*.

premises and accommodation for staff, for example, are identical with the corresponding provisions in the Vienna Diplomatic Convention. With some corresponding articles there is a degree of elaboration in the later Consular Convention—for example in Article 29 on use of the national flag and coat of arms and in the Definitions Article which contains a definition of 'consular archives' which has no parallel in the Diplomatic Convention. These later clarifying provisions are in practice assumed to apply also to the earlier Diplomatic Convention.[10] Cases relating to one of the conventions are routinely cited—with due regard to the clear differences in the privilege or immunity accorded—in legal proceedings requiring construction of the other.

19.16 A basic distinction is drawn in the Vienna Convention on Consular Relations between consular posts headed by a career officer and consular posts headed by an honorary officer. Posts in the former category, which are given a status much closer to that of a diplomatic mission, are dealt with in Chapter II of the Convention. These posts themselves are, with only two significant exceptions, given the same treatment as to inviolability of premises, inviolability of archives and documents, freedom of movement, exemption from tax on their premises, and on the fees and charges levied in the course of the work as is given under the Vienna Diplomatic Convention to diplomatic missions. The two exceptions limit the inviolability of consular premises. Where there is a fire or other disaster requiring prompt protective action on the part of the authorities of the receiving State, these authorities may assume that they have the consent of the head of the post to enter the premises. There is no such implied authority in the case of diplomatic premises (see Chapter **8**, paragraph **8.**11 above). If expropriation of consular premises is necessary for purposes of national defence or public utility (for example to allow a major road to be widened), it is permissible, provided that all possible steps are taken to avoid consular work being impeded and provided that prompt, adequate, and effective compensation for the property expropriated is paid to the sending State. Such expropriation could not take place in regard to diplomatic premises except with the express consent of the sending State (paragraph **8.**13). The differences in treatment may be explained by the greater degree of sensitivity and vulnerability of embassies carrying out political work for which guaranteed confidentiality of papers and proceedings is essential. There is also the practical consideration that while embassies are usually detached buildings, consulates often form part of a larger office block so that danger from fire or other emergency is less easily contained. In 1988, the ambassador of Panama to London, a supporter of General Noriega, instructed a private security company

[10] See E Denza, *Diplomatic Law* (3rd edn, 2008) 195–6.

to repossess the premises of the Panama Consulate after it was taken over by supporters of the deposed President of Panama, Senor Delvalle. The action was publicly criticized by UK ministers and proceedings were brought against staff of the security company, only to be dropped after it was made clear that the repossession action had been cleared in advance with the Diplomatic Protection Group within the police who had advised that it would be legal, though they would keep a watching brief because of the inviolability of the premises.[11]

19.17 As to freedom of communications with the sending State and with its diplomatic missions and other consular posts, wherever situated, there is a difference from the corresponding Article in the Vienna Diplomatic Convention in that Article 35.3 of the Consular Convention permits challenge to a consular bag reasonably suspected of containing something other than the permissible official contents. If the authorities challenge a suspect consular bag they may request that it be opened in their presence by a representative of the sending State, and if the request is refused the bag must be returned to its place of origin. In practice the distinction in treatment is unlikely to be of great significance in that an attempt to smuggle improper contents would almost certainly make use of a diplomatic bag and, as pointed out in Chapter **8**, even in such a case it would be possible for the authorities of the receiving State to challenge a bag whose contents posed a threat to human life.

Career Consuls

19.18 Career consular officers are given broadly the same privileges as are given to a diplomatic agent under the Vienna Diplomatic Convention: exemption from taxation subject to similar exceptions, exemption from customs duties and inspection of personal baggage, exemption from social security obligations and from personal, public, and military service. But their immunities are much more limited than those enjoyed by diplomatic agents. Consular officers are under Article 43 of the Vienna Consular Convention immune from the jurisdiction of courts and authorities of the receiving State only in respect of acts performed in the exercise of consular functions. They are not accorded the personal immunity extending to their private acts to which (with limited exceptions) diplomatic agents are entitled. It is emphasized in Article 43 that a consul does not have immunity from a civil action arising out of a contract unless the consul contracted expressly or impliedly as agent of his own State. Nor does he have immunity from a third party claim for damage arising from an accident in the receiving

[11] *The Times*, 9 and 11 March, 4 June 1988.

State caused by a vehicle, vessel, or aircraft. It is therefore not relevant in the case of a suit against a consul whether he was driving on duty when the accident leading to the claim occurred. In either case he has no entitlement to immunity. It must however be borne in mind that a diplomat, even when he is exercising consular functions as he is clearly permitted to do, remains entitled to full personal immunity on the basis of his diplomatic appointment. The same is true where an individual concurrently holds both a diplomatic and a consular appointment. The rules for the exercise of consular functions by diplomatic missions are set out in Article 70 of the Vienna Consular Convention.

19.19 A court when required to determine whether a particular act was performed by a consul 'in the exercise of consular functions' should have regard to the list of functions set out in Article 5 of the Vienna Consular Convention and in any other applicable international agreement, and to such evidence as may be submitted by the consul or by his sending State. The test is however an objective one, so that a statement by the sending State that the act was performed in the exercise of consular functions is not conclusive. There may be immunity for the consul even where the act apparently violated local laws or regulations—for example the issue of a passport to a minor child who was a national of the sending State at the request of her father who had paternal authority, even though the local courts would have awarded custody of the girl to her mother who was a national of the receiving State.[12] On the other hand, where Article 5(a) circumscribes a particular consular function—protecting the interests of the sending State and its nationals—by the words 'within the limits permitted by international law', a national court may take a restrictive construction of the immunity conferred. In the case of *Gerritsen v de la Madrid Hurtado*,[13] the defendants, who were Mexican consuls in Los Angeles, were charged with striking the plaintiff with a metal object, threatening him with a club and a gun, kidnapping him, and seizing his camera and the anti-Mexican leaflets which he intended to distribute outside the Mexican consulate. The United States Court of Appeals held that these actions interfered with the internal affairs of the receiving State and were not 'within the limits permitted by international law'. Nor could they be covered by the words in Article 5(m) ('performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State . . .'), since it was apparent that many of the alleged acts contravened US penal laws.

[12] *In re Rissmann* (1970) 1 *IYIL* 254.
[13] 819 F 2d 1511 (9th Cir. 1987), 1987 *AJIL* 949.

19.20 A career consul does enjoy under Articles 40 and 41 of the Vienna Consular Convention a degree of personal inviolability, although more limited than that of a diplomatic agent. The receiving State is under a duty to respect and protect his person, freedom, and dignity. If a criminal charge is brought against him, he may be arrested or detained only in the case of a 'grave crime'[14] and pursuant to a decision by a judge or court. If he is arrested or detained pending trial, the head of the consular post, or the sending State in the case of detention of the head of the post, must be notified of the detention. If criminal proceedings are taken against him he must appear, although the proceedings must be conducted with due respect to his position and so as to hinder his functions as little as possible. The fact that he must appear before the court does not of course prevent his claiming that he is entitled to immunity because the act in respect of which proceedings are brought was an official act. If he is found guilty, and provided that the sentence is no longer subject to appeal, he may be imprisoned. Neither his residence nor his property has any inviolability. Where residences for consuls and consular staff are located in the same building as the part of the premises used exclusively for the work of the consular post, the areas used for consular work—which are entitled to inviolability to the extent described above—should be clearly delineated.

19.21 Career consular officers are under Article 44 not exempt from the duty to attend if summoned as witnesses, although if they decline to give evidence no coercive measure or penalty may be applied to them. They are under no obligation to give evidence on official matters or to produce official correspondence or documents, or to give evidence as expert witnesses on the law of the sending State. States however to an increasing extent seek to be helpful by authorizing their consuls to testify in proceedings in other States where there is no special sensitivity in the evidence likely to be sought.

19.22 Career consular employees are accorded broadly similar privileges to those given to administrative and technical staff in a diplomatic mission. Their immunities are, however, strictly limited. They enjoy no personal inviolability whatsoever, and their immunity from jurisdiction is, like that of career consular officers, limited to acts performed in the exercise of consular functions. They are exempt from the obligation to give evidence on official matters.

19.23 Members of the service staff in a career post are accorded only tax exemption on their wages, exemption from social security obligations, and exemption from the obligation to perform personal or public services.

[14] The term 'grave crime' was not defined in the Vienna Consular Convention, but is defined in the law of a number of States Parties to the Convention, including the UK Consular Relations Act 1968 (c 18).

19.24 Members of families in the case of a career consular post enjoy, broadly speaking, the same privileges as the entitled member of the post, but they have no entitlement to immunity or inviolability.

19.25 The rules regarding waiver of privileges and immunities, and regarding the beginning and end of privileges and immunities are virtually the same as those which apply to diplomatic staff. There is, however, one provision—Article 57—which has no parallel provision in the Vienna Diplomatic Convention. Consular employees or members of the service staff who engage in private gainful occupations, together with their families and private staff, are excluded from all privileges and immunities and not just in relation to their private gainful activity. Members of families who themselves engage in private gainful occupations suffer a similar exclusion.

19.26 Under Article 71 of the Vienna Consular Convention, consular officers who are nationals or permanent residents of the receiving State are excluded from all privileges and immunities except for immunity from jurisdiction and inviolability in regard to official acts performed in the exercise of their functions. It is possible that this immunity is more limited than that accorded to consular officers who are not nationals or permanent residents of the receiving State because of the requirement that an act, to be covered by immunity, must be 'official' as well as 'performed in the exercise of consular functions'. Their families, other members of the post who are nationals or permanent residents of the receiving State and their families, as well as members of families and members of private staffs who are themselves nationals or permanent residents of the receiving State, are excluded from all entitlement to privileges or immunities.

Honorary Consuls

19.27 Chapter III of the Vienna Consular Convention sets out a distinct régime for honorary consular officers and for posts headed by such officers. These posts are given very limited privileges and immunities. Many of the obligations relating to posts headed by a career officer are applied—for example the provisions on facilities, acquisition of premises, freedom of movement and communications. Their premises are however not inviolable, although the receiving State is required to protect them from intrusion, damage, or impairment of dignity. Premises headed by an honorary consul are likely also to be used for his private or business purposes and they are unlikely to contain highly sensitive material. These premises are given tax exemption provided that they are owned or leased by the sending State. Inviolability of consular archives is conditional on their being kept separate from the consul's private and business papers. Only specified articles for office use

such as coats of arms, seals, office furniture, and similar articles, are entitled to exemption from customs duty: it is clear that alcohol and other consumables for official entertainment by an honorary post may not be imported free of duty.

19.28 Honorary consuls are given the same limited immunity from jurisdiction as career consuls. They are not entitled to any personal inviolability although they are entitled to 'such protection as may be required' by reason of their official position. If proceedings are instituted against them, they must be conducted with respect and so as to hinder consular functions as little as possible. Their privileges are limited to tax exemption on their official emoluments and exemption from personal and public services. Their families are accorded no privileges or immunities. If the consul or members of his family are nationals or permanent residents of the receiving State—and this is nearly always the case—they are excluded from almost all privileges and immunities on the same basis as career consuls and their families. It may be said in general that the Vienna Convention has not increased the status of honorary consuls and their posts above what was accorded under customary international law. It is only career consuls and their posts whose status has been elevated by the Convention.

19.29 As Article 68 of the Vienna Consular Convention makes clear, each State is free to decide whether it will appoint or receive honorary consular officers. Because they are not salaried and do not generally entail the costs of establishment abroad or of posting while they may well have a deep knowledge of local practices and attitudes, they may well have advantages for a sending State in certain contexts. This has however to be balanced by the likelihood of their lesser commitment to the interests of the sending State together with the much lower degree of protection and immunity within which they must operate.

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CONSULAR ACCESS AND PROTECTION

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20.1 As emphasized in Chapter **19**, paragraph **19**.6 above, protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, is the first and most important of consular functions. For many States there has in recent years been enormous growth in the demand for consular protection as businesses increasingly set up subsidiaries and branches overseas and individuals travel abroad as migrant workers, providers, and consumers of services, as students, as tourists, and as refugees. National laws vary greatly not only on such obvious matters as dress and the public consumption of alcohol but also on driving and road safety, photography of sites of cultural or security interest, and entitlement to social benefits and to police protection. In consequence it is easy for the unwary traveller to contravene local laws and to be arrested and detained in police custody without knowledge even of the language, far less of how to secure the services of an interpreter or competent legal representation. In August 2008, figures released by the UK Foreign and Commonwealth Office revealed that in the year ending March 2007, 2,032 British nationals—a 33 per cent increase on the previous year—were arrested in Spain, and that this was due not only to growth in the number of tourists, residents, and travelling supporters of British football teams, but to the fact that failure by a driver to carry his driving licence had become an arrestable offence there.[1]

[1] *The Times*, 12 August 2008.

Consular Protection and Diplomatic Protection

20.2 A clear distinction must be drawn between consular protection and diplomatic protection—even though consular protection and diplomatic protection may be exercised successively or even on occasion simultaneously in respect of the same events and the lines sometimes become blurred. As explained in paragraph **19.**7 above, consular protection as well as diplomatic protection may only be exercised on behalf of a national of the sending State, and where the individual or company is also a national of the receiving State, the right to protection may be denied or challenged. Diplomatic protection is defined in the draft Articles drawn up by the International Law Commission as follows:

> For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[2]

Before a State may exercise its right of diplomatic protection of its national, it is—with certain exceptions—essential that the national has exhausted all local remedies—that is, legal remedies open to an injured person before judicial or administrative courts or bodies of the State alleged to be responsible. With consular assistance or protection on the other hand, there is no requirement that the national must have exhausted local remedies—indeed the primary purpose of consular protection is usually to provide assistance in the pursuit of local remedies whether with the local authorities or with prison or judicial bodies. Once again this brings out that the essential difference between consular and diplomatic functions is not the objective of the specific task but the method and level at which it is performed.

20.3 The distinction is well illustrated by a case decided in 1999 by the UK Court of Appeal, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Butt.*[3] Judicial review proceedings were brought by the sister of one of nine British citizens on trial in Yemen on terrorist charges to require the Secretary of State to make personal representations to the president of the Yemen that the trial be halted, an independent medical examination appointed to examine allegations of torture of the accused, and a retrial ordered before delivery of a verdict. It was argued on behalf of the applicants that there had already been intervention by the

[2] UN Doc. A/CN.4/L.684, 19 May 2006.

[3] Court of Appeal (Civil Division) FC3 99/6610/4. See also *R (on the application of Al Rawi and Others v Secretary of State*, Court of Appeal (Civil Division), 2006 EWCA 1279, October 2006.

provision of consular assistance so that it would be irrational to cease now. The UK authorities had insisted on the availability of consular visits, family visits, legal visits, and medical attendance and treatment, had applied pressure to have the allegations of torture investigated, and made some representations to the trial judge and the prosecutor. They had not however made any representations to the judge about the conduct of the trial or brought pressure on the president of Yemen since this would have constituted interference in the internal affairs of Yemen. The Court of Appeal held that the decision by the UK authorities not to make diplomatic representations until the case had concluded and local remedies exhausted was not one which was justiciable by way of judicial review.

General Aspects of Protection

20.4 Many of the specific functions already mentioned in Chapter **19** above—such as issue of passports or helping with provision of advice on local law have in them an element of protection. A consul may take steps to safeguard the rights or interests of a national who is not present in the territory of the receiving State—for example during the local administration of an estate—or may ask for the postponement of legal proceedings, for example on child custody, to enable the national of the sending State to attend in person or make adequate representations to the courts or authorities. Performing marriage ceremonies, settling disputes arising on visiting ships, or making arrangements for the administration of property of a national of the sending State who has died in the receiving State may all in some sense 'protect' the foreign national or ship from the application of local laws which they might consider unsuitable. The consul has for such purposes a general right of access to his own nationals. This may be expressly safeguarded under the terms of a bilateral consular convention. Article 8.1 of the 1984 Agreement between China and the UK on the Establishment of a British Consulate-General in Shanghai and a Chinese Consulate-General in Manchester[4] for example provides:

> Consular officers shall have the right to communicate with nationals of the sending State and to have access to them in the consular district. The receiving State shall not in any way limit the communication of nationals of the sending State with the consular post or their access to it.

Article 36.1(a) of the Vienna Convention on Consular Relations makes similar provision—but on a wider basis in that the right of communication and access is not limited to the consular district. The right of access in ordinary circumstances

[4] Signed at Beijing on 17 April 1984, Cmnd 9247; UKTS No 14 (1985).

by a consul to his own nationals is generally regarded as having been established in customary international law.

20.5 Consuls—though protecting their nationals within a generally accepted international framework supplemented by treaty provisions—are also instructed by precise regulations supplied and updated by their sending State as to what they should or may do and on the appropriate procedures. In general they will not assume functions of a travel agent or investigative functions which belong to the local police. They will lend money only in exceptional circumstances—usually only for purposes of repatriation—and then only with the safeguards of an undertaking to repay and the retention of the traveller's passport while issuing an emergency one-way travel document.

20.6 Whether a consul is under a legal duty to provide any form of protection or to provide specific forms of protection to his own nationals is a question to be determined by the law of the consul's sending State. International law gives consuls rights to protect their nationals, but only in the most general sense does international law impose on them a duty to protect them. Consuls are of course appointed, instructed, and paid for the performance of functions of which protection is the most important, and their nationals have a legitimate expectation that consular assistance will be provided to them, but under the law of most States there is a large margin of discretion as to what assistance a consul actually provides. Even where the law of the sending State imposes an obligation it may well be extremely general—under the 1982 Constitution of China, for example, 'The People's Republic of China shall protect the legitimate rights and interests of Chinese nationals residing abroad'.[5]

Group Protection

20.7 Exercise of consular protection is most crucial and difficult in circumstances where some emergency in the receiving State puts many or sometimes even all nationals of the sending State into danger. Recent examples of disasters include the attacks on the twin towers of the World Trade Center in New York in 2001 in which dozens of British nationals were killed and many more temporarily missing, the Asian tsunami on Boxing Day 2004 which affected areas heavily populated by foreign tourists of many nationalities, and hurricane Katrina which

[5] Article 50. For the perspective of the six-year-old daughter of a consul see K Hickman, *Daughters of Britannia: the Lives and Times of Diplomatic Wives* (Flamingo, 2000) 221: 'My father is a Consel. If any person from England, Scotland, Wales or Irrlang is in trouble in any kind of way my Father has to go and loock after them ... If he doset like eny person he must not say o I don't like yo I don't want to help you. He must be nice and help them.'

struck New Orleans in 2005 killing or stranding many foreigners as well as US citizens. In such circumstances consuls will find themselves overwhelmed by demands from victims and from their families. With the limited financial and staff resources appropriate to normal circumstances, they will have to set up information and reception centres, help with repatriation of the dead and injured, coordinate distribution of relief and sometimes also contend with criticism from the press in their own country that more help is not being provided.[6] In 1955, for example, following the shooting down of an El Al aircraft which had strayed into Bulgaria in bad weather, there was press criticism of the allegedly unhelpful response of consular officials and of the Foreign Office who had advised that a visit to the crash site by distraught relatives was not practicable.

Notification to Consul of Arrest or Detention

20.8 By contrast with the position regarding the general right of a consul to have access to his own nationals, it was not obligatory under customary international law for the authorities of the receiving State to inform a consul if one of his nationals was detained in prison. Without such notification to the consul, of course, his right of access was often in practice of no value. Many States did in fact notify the consul as a matter of local law or practice if a prisoner requested it, but these were not always the States where concern on behalf of an imprisoned national might be greatest. In consequence, States increasingly made provision in bilateral consular conventions for compulsory notification, and this became established as a general rule in Article 36.1(b) of the Vienna Consular Convention which provides:

> If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

It should be emphasized that the consul must be informed only if the national, having been informed of his rights, so requests. If he prefers that his consul should not be notified—either because he does not wish the fact of his arrest or imprisonment to become known to his own authorities or because he is a refugee from his own country and wishes to have nothing to do with his own authorities—the

[6] On group protection generally, see L T Lee and J B Quigley, *Consular Law and Practice* (3rd edn, 2008) at 118–21.

consul will not be informed. This was a matter of some sensitivity during the Cold War when refugees did not in general want visits from their consuls who might well put pressure on them to return—perhaps through threats to members of their families in their home country. Some bilateral consular conventions did require consular notification regardless of the wishes of the detainee, and it was only after much controversy at the Vienna Conference on Consular Relations that the condition to protect the detainee who did not want his consul to be notified was included in Article 36. It remains however an important safeguard for protection of foreign nationals and in particular refugees. Some bilateral consular conventions however—concluded in particular by the United States—require automatic notification of a detention (mandatory notification), the reason being suspicion that the other country concerned might advance the supposed reluctance of the detainee as an excuse for failure to notify his consul.

20.9 The final sentence of Article 36.1(b) which requires the foreign national to be notified of his rights 'without delay' was added at the Vienna Conference by adoption of a UK amendment, and it is this crucial provision which when properly applied, sets in motion the entire system of protection. Many foreign nationals are unaware of their rights to consular notification, access, and protection and it has become apparent over recent years in particular that the prison authorities in many States Parties to the Vienna Convention are also insufficiently aware of the requirement. There have been a series of cases before the International Court of Justice[7] and before the United States Supreme Court[8] which brought out clearly the failure at state level within the United States to set up and apply procedures to ensure that foreign prisoners were aware of their rights to consular notification and access. Many of these cases concerned foreign prisoners sentenced to the death penalty without being informed of their rights to consular notification and access. In response to these cases, the US State Department in 1998 published and distributed to arresting and prison authorities a handbook of guidance on consular assistance[9] and a card to be carried by individual arresting officers. Conscious of the need of the United States for reciprocal consular access to its citizens abroad, President Bush issued in February 2005 a Memorandum to the US Attorney-General on the need to review cases affected by the judgment of the International Court and the US government has also issued directions to state

[7] See in particular *Breard (Paraguay v US)* 1998 ICJ Reports 266; *Lagrand (Germany v US)* 2001 ICJ Reports 466); *Avena (Mexico v US)* 2004 ICJ Reports 12.

[8] For example *Sanchez-Llamas v Oregon,* No 04-10566; *Medellin v Texas,* No 06-984; 552 and 554 U.S. (2008).

[9] Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them.

Attorneys-General and has set up intensive training systems. In the United Kingdom the procedure for notification is contained in a Code of Practice under the Police and Criminal Evidence Act 1984. Other States, such as New Zealand and Ireland, have specific national legal or administrative procedures to guarantee that prisoners are informed of their rights and others are considering their adoption. The question of notification has become a matter of widespread international concern as a result of the cases against the United States and greater emphasis on practical enforcement of human rights. It is clear however that international treaties cannot safeguard the right without detailed procedures at national and local level and consuls should make sure that they are aware of the precise position in any jurisdiction in which they are posted.

20.10 The phrase 'without delay' in the context of informing a foreign national of his rights and also that of informing the consular post is also imprecise and is interpreted differently in different jurisdictions. The Department of State has taken the view that it means 'as quickly as possible and, in any event, no later than the passage of a few days'. Greater precision has been added by the terms of many bilateral consular conventions. The 1972 Consular Convention between the United Kingdom and the Hungarian People's Republic,[10] for example, provided in Article 43 that 'Notification shall be made without delay and in any event within three days'. Article 8 of the 1984 Agreement between the United Kingdom and China on the Establishment of a British Consulate-General at Shanghai and a Chinese Consulate-General at Manchester[11] requires notification to the consular post 'as soon as possible and at the latest within seven days from the time at which the personal freedom of that national is restricted'. Prompt notification is designed to ensure that the person detained is aware of and can take advantage of his rights before questioning—at which point there is a risk of his making self-incriminatory statements—or at the latest before charges are brought. The International Court of Justice in the *Avena* case[12] held that 'without delay' did not necessarily mean 'immediately and before interrogation', but other tribunals have taken a more rigorous interpretation on the timing of notification because of its importance in the context of safeguarding defence rights. There is also uncertainty as to whether the authorities of the receiving State are required to inform a detainee of his right to consular notification if they are not aware that he is a foreign national. National practice varies on whether all detainees are asked about their nationality, but it is probably acceptable if notification takes place as soon as the authorities are aware, or have reasonable grounds to suspect that the

10 UKTS No 2 (1972).
11 Cmnd 9247; UKTS No 14 (1985).
12 2004 ICJ Reports 12, at paras 87–8.

detainee is a foreign national. The International Court of Justice in the *Avena* case noted the assurance of the United States that routine checks on nationality of detainees were made by some US law enforcement authorities, and described this practice as 'desirable' while stopping short of declaring it mandatory.[13]

Consular Access

20.11 Article 36.1(c) of the Vienna Consular Convention provides some substance to the right of consular access in the following terms:

> consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

In addition to legal representation, a consul may also assist with provision of interpretation and with securing bail which is often more difficult for a foreign national—often thought likely to try to return to his own home if released on bail. As with the question of notification, there is a lack of precision in Article 36 as to how frequently a consul is entitled to exercise his right of access to a prisoner. In the 1960s when Gerald Brooke, a London lecturer, was imprisoned in Moscow on a charge of disseminating subversive literature, the British consul in Moscow was given access to him only at very long intervals. Soon afterwards the United Kingdom began negotiation of a Consular Convention with the Soviet Union[14] intended to enhance rights of consular access by requiring access on a regular basis, and such specific requirements were repeated in later conventions concluded by the UK with Communist States and with others, and also in bilateral conventions concluded by the United States. Article 8.2 of the 1984 UK-China Agreement,[15] for example, provides that

> [a] visit to that national as requested by consular officers shall be arranged by the competent authorities of the receiving State two days after the consular post is notified of the restriction of the personal freedoms of that national. Subsequent visits shall be permitted at intervals not exceeding one month.

[13] Ibid, at para 64.
[14] 665 UNTS 259.
[15] Cmnd 9247.

The 1985 Consular Convention between the United Kingdom and Egypt[16] in Article 12 requires that the initial consular visit should be permitted 'as soon as possible and at latest within three days from the date on which the national was subjected to deprivation of liberty' and that '[s]ubsequent visits may take place at intervals of no more than one month'.

20.12 Following sentence, the purpose of consular visits becomes mainly to ensure humane and non-discriminatory treatment for the foreign prisoner, to assist with possible appeals for review of conviction or sentence or for clemency, to assist with provision of adequate food and medicine and, within the limits of the prison rules, communication with family and others outside the prison. The consul should be aware whether there are in force between sending and receiving States bilateral or multilateral treaty provisions permitting prisoners under specified conditions to be returned to serve the remainder of their sentence in their home State and if so, should advise the prisoner of the possibility of applying in due course for a transfer. A Council of Europe Convention on the Transfer of Sentenced Persons[17] drawn up in 1983 is open to participation by States outside Europe and now has over 50 parties. Transfer under the 1983 Convention requires the consent of the host State, of the prisoner's home State, and of the prisoner. Such transfers may not only assist in ensuring that the prisoner is suitably treated, kept in touch with family and friends, and prepared for eventual release but also reduce the burden on the consul of regular visits and assistance.

16 Cmnd 9603.
17 European Treaty Series No 112.

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Book VI

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LEGAL FRAMEWORK FOR MULTILATERAL DIPLOMACY

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21.1 The previous chapters in this book have largely discussed diplomacy as conducted on a bilateral basis between States. The 5th edition referred to the startling changes which in modern times had affected the pace and methods of diplomacy and noted the new phenomenon of diplomacy by conference based on permanent organizations meeting regularly and serviced, not by officials of member governments or of the government of the country in which the conference is held, but by independent international staffs of their own. In the subsequent 30 years modern communications have transformed diplomatic practice making possible monthly meetings and weekly conversations of ministers with their counterparts in other countries, thrice-yearly meetings of EU presidents and prime ministers and regular meetings at ministerial and prime ministerial level in most international organizations. Subsequent chapters will discuss in detail the conduct of diplomacy by means of the United Nations, regional organizations (in particular the EU), and other international institutions. This chapter

will provide a brief description and comparison of the various forms of multilateral diplomacy now in use and outline the regimes of privileges and immunities applied to international organizations and to civilian missions and visiting armed forces of a State or international organization on the territory of another State.

The Development of Multilateral Diplomacy

21.2 In the nineteenth century multilateral cooperation in the main was carried on through congresses and conferences such as the Congress of Vienna 1815, and the Congress of Paris 1856 convened to deal with particular situations. The first standing committees to be set up were regional institutions to deal with technical matters such as the Commissions to regulate the Rhine, the Danube, and other rivers. The Universal Postal Union is one of the first two examples of a worldwide permanent organization[1] and was set up as a consequence of the Berne Conference on postal matters in 1874. It seemed a highly suitable field in which to establish a permanent body: there was an obvious need for States to cooperate so that letters stamped and posted in one country could be transported and delivered in another, there was plenty to argue about at the technical level, but political differences were not involved in the subject matter, nor in a relatively tranquil age were they introduced into technical discussions among government experts.

21.3 For the discussion of political matters, there was in the nineteenth century no movement towards setting up a permanent organization. Probably the nearest practical approach to the concept of an international organization to maintain peace was the First Hague Conference of 1899 which established the Permanent Court of Arbitration. The tacit assumption that the affairs of Europe and world peace and war were almost synonymous and could be successfully regulated by the Concert of Europe was, however, shattered by the outbreak of war in 1914 and the destruction of the old European order in the following four years of the First World War.

The League of Nations

21.4 On the termination of that war the League of Nations was established in 1919 as an international governmental organization 'to promote international cooperation and to achieve international peace and security'. The League sought to achieve these aims by a Covenant requiring Member States to accept an obligation not to

[1] The oldest was the International Telegraph Union—now the International Telecommunication Union.

resort to war (spelt out in the Kellogg-Briand Pact of 1928), 'by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples one with another'. The failure of the United States of America to join as a member, followed by economic recession and the growth of dictatorships whose aggression the League was unable to stop through sanctions, led to the League itself gradually being perceived as impotent and irrelevant.

The United Nations

21.5 The Second World War followed from 1939 to 1945 leading to the establishment of the United Nations in 1947; whilst the maintenance of peace was still a goal this second international organization open to all States was different in its wider aims and in the means to be adopted; the peoples which make up States were to be enrolled and the organization itself was to be empowered to take effective measures. The first difference is found in the UN Charter which was prefaced by a declaration in the following terms:

> We the peoples of the United Nations
>
> determined to save succeeding generations form the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
>
> to establish conditions under which justice and respect for the obligations arising from treaties and other sources of law can be maintained, and
>
> to promote social progress and better standards of life in larger freedom;
>
> . . .
>
> have resolved to combine our efforts to accomplish these aims.

The second difference was in Article I of the Charter which stated that the first of the purposes of the organization was to maintain peace and security and 'to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression and other breaches of the peace . . .'

The differing forms of multilateral diplomacy

21.6 Turning to the different forms of diplomacy, there is today considerable diversification of legal structures. The choice of means depends on many factors;

whether the direct involvement of States is required or a call for action by civil society will be sufficient; in this latter case, whether by coordination of national bodies, by the action of an existing non-governmental body, or the creation of a new one. Where States are to be involved, the intensity of the cooperation required is to be considered and whether it may be best achieved by a programme in which private participants such as multinational corporations are also entitled to join; if confined to States, whether sufficient intensity of participation will be achieved by an association or whether an independent international organization with strong delegated powers to put its decisions into effect is required. A carefully drafted international agreement, or a series of bilateral agreements, will be required which must define the structure and purposes of the association or organization and any special privileges and immunities to be conferred.[2]

Associations and international organizations

21.7 States may form themselves into an international association without creating an independent legal person, though if the objectives which they further are found useful they usually progress to full legal personality as with the Association of Southeast Asian Nations (ASEAN) which under its Charter, in force 16 December 2008, was granted by its Member States legal personality; the Commonwealth of Independent States (CIS), however, remains as an international association (see Chapter **28** below). Alternatively, they may establish a separate international organization. Such an international organization is defined as an organization established by treaty, governed by international law, possessing its own legal personality, and with its membership largely composed of States.[3] Where an organization is given international legal personality it is entitled to conclude treaties and international agreements in its own right and to bring international claims in its own name or on behalf of its officers and servants.[4] It may also be held responsible for damage or injury resulting from its activities, though whether this liability excludes the concurrent liability of its Member States is a complex and controversial question. Where an international organization is given legal capacity in the law of a Member State, it will not normally be

[2] See D Akande, ch 9 'International Organizations', in M D Evans (ed) *International Law* (2nd edn, 2006).

[3] Schermers amd Blokker in *International Institutional Law* (3rd edn, 1995) at para 29 put forward three requirements: establishment by international agreement, possession of its own separate organs, and operation under international law. Gardiner in *International Law* (Longmans, 2003) suggests at 206: 'International organisations are legal entities created by groups of states and functioning under international law to achieve purposes defined in their constitutions'.

[4] This was confirmed by the International Court of Justice in its Advisory Opinion *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Reports 174.

possible to bring legal proceedings in the courts of that State against Members in respect of debts or obligations of the international organization. Thus when in 1986 the International Tin Council collapsed owing one thousand million pounds to bankers, brokers, and traders, these creditors were unable to sue the Member States in United Kingdom courts to recover their debts, since the Council had by national legislation giving effect to the relevant international agreement been accorded 'the legal capacities of a body corporate'.[5] Where there is no international organization endowed with a separate legal personality, the Member States may be sued even if the organization has acted as their agent. The European Union has been accorded express treaty-making capacity and the Council has concluded many international agreements in the name of the Union, but has not—as yet—been accorded full international legal personality and its Member States have in practice continued to accept responsibility for claims resulting from military activities carried out by the Union.[6]

21.8 An account of many of these international organizations will be found in the immediately following chapters, and the United Nations and the European Union are covered in considerable detail. International organizations with restricted membership established primarily on the basis of geographical criteria, include the European Union (EU), the African Union (AU), and the Organization of American States (OAS). Other organizations may have competence in particular fields—the World Trade Organization (WTO) for example, is mainly responsible for the promotion of international trade and economic development, while the North Atlantic Treaty Organization (NATO) is primarily intended for the coordination of the armed forces of its members as a guarantee of collective security against armed attack on their territories. The Organization for Security and Co-operation in Europe (OSCE) which evolved from East-West cooperation beginning during the Cold War, is now the primary instrument for early warning, conflict prevention, and crisis management throughout Europe.

21.9 The restriction of the membership of these international organizations primarily to States (with a few open also to regional economic integration organizations—see Chapter **27**, paragraph **27**.19) distinguishes them from looser forms of international association. The International Committee of the Red Cross (ICRC)—founded in 1863—is composed of the national Red Cross and Red Crescent Societies and brings together in annual conference their representatives with those drawn from States Parties to the Geneva Conventions on the laws

[5] *Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, HL.

[6] See paragraph **27**.27 below. The Treaty of Lisbon would confer express legal personality on the European Union, which would subsume the legal personality of the Community and of Euratom.

applicable to armed conflict;[7] non-governmental organizations such as Amnesty and Greenpeace (see Chapter **20** below) are established as private law bodies though they operate in more than one country. International public corporations or joint interstate enterprises are entities jointly created by a group of States, usually for the performance of commercial functions. Examples include the European Company for the Financing of Railway Rolling Stock (EUROFIMA) which is set up by treaty but incorporated under Swiss law; Air Afrique, an airline established by West African States; and Scandinavian Air Services (SAS), an airline established by Norway, Denmark, and Sweden.

Privileges and immunities

21.10 One factor which will be relevant in determining the appropriate form for international cooperation on a particular matter is whether the body to be established and its officers and servants are thought to require privileges or immunities. The protection, privileges, and immunities accorded to a diplomatic mission, its head, and members have to some extent provided a precedent and justification for the development of protection for those engaged in multilateral forms of cooperation—military attachés and ad hoc observers or inspectors of military installations or of compliance with international environmental standards are frequently and quite properly appointed as members of a sending State's mission and entitled on that basis to diplomatic immunities and privileges. The law of state immunity also provides a general immunity for the defence authorities as an organ of the State, and for its officers and military advisers as representatives of the State. But more specific provision has been found necessary in order to deal on a satisfactory basis with international organizations and with visiting forces.[8]

21.11 International law regarding the privileges and immunities of international organizations is an entirely modern development. Although the Covenant of the League of Nations did make provision for representatives of members of the League and officials to enjoy diplomatic privileges and immunities when engaged on business of the League, and accorded inviolability to the buildings of the League and of representatives attending meetings,[9] there were no multilateral agreements defining in detail the privileges and immunities to be accorded to international organizations or persons connected with them. Outside Switzerland,

[7] For a brief account of the constitutional evolution of the Red Cross see R K Gardiner, *International Law* (Harlow, 2003) 261–3.

[8] The European Convention on State Immunity, Article 31 excludes acts committed by visiting armed forces from its provisions and the same position would seem to apply in respect of the provision of the 2004 UN Convention on State Immunity.

[9] Article 7.

which housed most of the earliest established international organizations, and the Netherlands, where the Permanent Court of International Justice had its seat at The Hague, there was very little state practice.

21.12 After 1945 the position changed swiftly and dramatically. International organizations, both worldwide and regional, multiplied rapidly. But little attempt was made in the early years after the war to formulate privileges and immunities for them on a general basis. It was left to the negotiators of the international agreements by which the individual organizations were established to make provision, either in general or specific terms, for appropriate privileges and immunities to be accorded by States Members to the organization itself, its premises, property, archives, and communications, and to the different classes of persons connected with the organization—representatives of Member States, staff members, and experts.

21.13 The most important agreement drawn up at this time was for the United Nations itself. The Charter of the United Nations made only very general provision for privileges and immunities. Article 104 provided that '[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.' Article 105 required that the organization should enjoy 'such privileges and immunities as are necessary for the fulfilment of its purposes' and that representatives of members and officials of the organization should enjoy 'such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization'. As envisaged in Article 105, a detailed international agreement for the application of these general provisions was then negotiated. The General Convention on the Privileges and Immunities of the United Nations[10] was adopted by the General Assembly of the United Nations on 13 February 1946 and opened for accession by UN members. It has received overwhelming support from members although the United States, the host State to the UN, did not become a party until 1970 and instead regulated its relations with the United Nations on the basis of a Host State Agreement with the organization. Both Agreements now apply on a complementary basis.

21.14 The General Convention on the Privileges and Immunities of the United Nations confers on the United Nations legal personality, in particular the capacity to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings. It accords full immunity from jurisdiction and every form of legal process to the UN, its property and assets, and inviolability to its premises and property, its archives and documents wherever located. The UN is

[10] UKTS No 10 (1950).

given wide-ranging exemptions from national exchange control and other financial regulations and exemption from direct taxes, customs duties, and prohibitions and restrictions on import and export of its publications. An exception is made, as regards tax exemption, of taxes 'which are, in fact, no more than charges for public utility services'. Where the United Nations makes important purchases, for official use, of property on which taxes have been paid or are payable, Member States in which the purchases are made are, whenever possible, to make administrative arrangements for remission or refund of the tax. The United Nations is accorded diplomatic treatment for its communications (including such matters as rates and priorities for mail, telephone calls, and so on) and it may use codes, couriers, and diplomatic bags in the same way as a diplomatic mission. No censorship may be applied to the official correspondence and other official communications of the United Nations.

21.15 Representatives of members at the United Nations (a term which includes delegates, deputy delegates, advisers, technical experts, and secretaries of delegations) are accorded a scale of privileges and immunities which falls somewhat short of what is accorded to a diplomatic agent under the Vienna Convention on Diplomatic Relations. While exercising their functions or journeying to or from the place of meeting, they are given immunity from arrest and detention and from seizure of their personal baggage. They have an unlimited immunity from jurisdiction in respect of words spoken or written and all acts done by them in their capacity as representatives, but they do not have the immunity from jurisdiction in regard to their personal acts which is enjoyed by diplomatic agents. They are specifically accorded inviolability for all papers and documents, the right to use codes, couriers, and sealed bags, exemption for themselves and their spouses from immigration restrictions, aliens' registration and national service obligations, facilities in respect of currency or exchange restrictions, diplomatic treatment for their personal baggage (so that it is exempt from inspection except where there are serious grounds for suspecting abuse of the privilege). They are not given a general exemption from taxes or customs duties, but it is provided that where taxes are levied on a basis of residence, periods during which representatives are present in a State for the discharge of their duties are not to be considered as periods of residence. In addition they are accorded such other privileges, immunities, and facilities not inconsistent with the foregoing as diplomatic envoys enjoy. This means that where a privilege or immunity has been accorded in a limited form by the Convention, no more need be accorded to the representative, but privileges and immunities not mentioned at all, but which are given to diplomatic agents, should also be given to the representative. States are not obliged to accord any privileges or immunities to their own national representatives. The protection from interception of their

communications enjoyed both by the UN and by representatives to the UN in New York meant that there was widespread anger when it was revealed through a leak in March 2003 that the US National Security Agency had ordered intensification of surveillance of telephone conversations and emails of UN delegates whose votes would be crucial in the attempt (later abandoned) to secure a second Security Council resolution explicitly authorizing the use of force against Iraq. The allegation of bugging was supported by the delegations of Mexico and Chile and by the admission of a former UK cabinet minister in a radio interview that UK authorities had also been implicated.[11]

21.16 Officials of the United Nations, in general, are accorded a narrow range of privileges and immunities which can easily be justified as essential to enable them to perform their job independently of any control or interference by any Member State. They are immune from civil and criminal jurisdiction in respect of words spoken or written and all acts performed by them in their official capacity. The salaries and emoluments paid to them by the United Nations are exempt from tax. They are immune from national service obligations, immigration restrictions and aliens' registration (together with their families), and from exchange control regulations. In time of international crisis they can claim the same right to be repatriated as a diplomatic agent. When they first take up their post with the United Nations, they have the right to bring their furniture and effects duty free into the country to which they are posted, but subsequently they have no further exemption from customs duty. All Member States allow a period of grace for the import of household effects after the arrival of the official in person, but the length of the period varies between different States within a range of three months to two years. Officials have no personal inviolability, or inviolability of residence or property, immunity in regard to their personal acts, or any personal privileges other than those mentioned above, which are needed to ensure that they are personally at the disposal of the United Nations.

21.17 The only officials of the United Nations who under the General Convention are accorded privileges and immunities on the diplomatic scale are the secretary-general himself and all assistant secretaries-general. These 'High Officers' are given all the privileges and immunities accorded under international law to an ambassador under the Vienna Convention on Diplomatic Relations. The State of which a High Officer of the United Nations is a national or permanent resident

[11] *The Observer,* 2 March 2003, 15 and 29 February 2004; *The Guardian*, 26 and 27 February 2004. Criminal proceedings were brought against the author of the leak, a translator at the UK Government Communications Headquarters (GCHQ), but dropped in the face of advice that the prosecution would be unable to disprove her defence of 'necessity'—justifying the leak because it exposed serious illegality.

need therefore only accord him the more limited immunities which it is obliged under Article 38 of the Vienna Convention to accord to diplomatic agents under the same circumstances. The Convention imposes serious obligations on the United Nations itself to balance the immunities which it accords. It stresses that privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The secretary-general has the duty to waive the immunity of an official where in his opinion immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. No comparable duty is imposed on States by international law or by either of the Vienna Conventions in regard to waiver of any immunity enjoyed by their diplomats or consuls, but a duty is laid on them by the General Convention to waive the immunity of their representative where this can be done without prejudice to the purpose for which the immunity is accorded. The United Nations is obliged to cooperate with members to facilitate the administration of justice and the observance of police regulations, and to prevent any abuse of privileges or immunities.

21.18 Experts on missions for the United Nations are treated separately from officials. The distinction between an official and an expert is that while an official has a contract of employment with an international organization and is invariably subject to its staff rules or regulations, the expert is engaged for a specific task, his contract relates only to the performance of and remuneration for that task and he is not subject to the staff rules of the organization. He is not the servant of the organization but is in the position of an independent contractor. The period of service is not the determining factor, for an organization may recruit officials as employees on a short-term basis (for example additional secretaries or interpreters for a conference) or on a part-time basis, and an expert may be engaged full-time on a specific task for an international organization for a prolonged period. Nor is the type of work a guide to status as an expert or official. The tasks for which experts may be engaged are infinitely varied. More typical assignments include serving independently on a committee of experts, fact-finding and reporting on some area of concern, and advising on some major new purchase or enterprise which the organization is contemplating. Experts under the United Nations General Convention are accorded, during the period of their missions and on journeys in connection with their missions, immunity from personal arrest or detention and from seizure of their personal baggage, inviolability for their papers and documents, the right to communicate with the United Nations in code, by courier, or by bag, the facilities in respect of exchange control and currency restrictions which the State concerned accords to representatives of foreign governments on temporary official missions, and diplomatic treatment for their personal baggage. In respect of words spoken or written and acts done

by them in the course of their mission, experts are accorded immunity from every form of legal process for an indefinite period. The Convention imposes on the secretary-general the same duty as regards the waiver of the immunity of an expert as is imposed in regard to the immunity of an official.

21.19 The immunity from legal process enjoyed by an expert and the procedure for determining whether conduct is 'in respect of words spoken or written . . . in the course of their mission' were reviewed in 1999 by the International Court of Justice in the *Cumaraswamy* case.[12] Cumaraswamy was a Malaysian lawyer appointed as Special Rapporteur on the Independence of Judges and Lawyers to the UN Commission of Human Rights and as such a UN expert on mission. While carrying out investigations in his home country of Malaysia he drew attention in a press interview to complaints that well-placed persons were able to manipulate the Malaysian justice system and commented on an ongoing case as a possible example of 'choosing a judge'. Following this interview defamation proceedings were brought against him in Malaysia. The UN secretary-general considered that the interview had been given in the course of Cumaraswamy's mission and asked the Malaysian government to advise the courts of his immunity, but the government declined to do so and instead confined itself to drawing to the attention of the Malaysian courts the legal basis for any immunity enjoyed by the defendant. The courts took the view that the determination by the UN secretary-general was an opinion which did not bind them and they also refused to rule on the question of immunity at the outset, joining it to the merits. The secretary-general then asked the Economic and Social Committee of the UN (ECOSOC) to request an advisory opinion from the International Court on the construction of the General Convention on the Privileges and Immunities of the UN. The Court did not uphold the claim by the secretary-general that his opinion on whether conduct was in the performance of a mission was conclusive, but they said:

> When national courts are seized of a case in which immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning the immunity. That finding, and its documentary expression, create a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The Court also held that Malaysia was in breach of the General Convention by not ruling on immunity at the start of proceedings, so nullifying the essence of immunity.

[12] *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 ICJ Reports 62.

21.20 The scale of privileges and immunities set out in the General Convention on the Privileges and Immunities of the United Nations was used as a model for other international organizations having worldwide membership and responsibilities. For the most part the United Nations scale was treated as a ceiling, and minor reductions in privileges and immunities were negotiated in the case of other organizations. It was accepted that few other international organizations had to carry out tasks of such political sensitivity or physical danger as the United Nations itself and that on a basis of functional need they could not therefore lay claim to the same level of immunity. The most important of the international agreements which followed the United Nations pattern was the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations,[13] which was adopted by the General Assembly of the United Nations on 21 November 1947. The Specialized Agencies Convention set out a detailed scale of privileges and immunities for the organization and for various categories of persons connected with it—representatives of Member States and United Nations officials—which was closely based on the United Nations scale and was described as 'the standard clauses'. The standard clauses made no provision for experts, and they provided that only the executive head of each Specialized Agency, including any official acting on his behalf during his absence from duty, should be accorded 'high officer treatment'—that is the additional privileges and immunities which are given to diplomatic agents under international law. Each Specialized Agency can, in accordance with its own constitutional procedure, make modifications as regards itself in the standard clauses by the deposit of an Annex containing such modifications at the time when the Convention becomes applicable to it, and all have now done so. Each Annex may be modified by the relevant Specialized Agency at a later date. Several Specialized Agencies have for example made provision, on the lines of the United Nations Convention, in relation to experts. The International Labour Organization has made special provision to treat as 'representatives' the employers' and workers' members and deputy members of the governing body of the organization—who do not represent member governments—and have also provided that any Deputy Director-General of the International Labour Office and any Assistant Director-General of the International Labour Office shall be accorded 'high officer treatment'. By 1977 the Specialized Agencies Convention applied to 16 Specialized Agencies of the United Nations,[14] with particular modifications for each one which are set out in the various Annexes.

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[13] UKTS No 69 (1959).

[14] The specialized agencies are:
International Labour Organization (ILO)
Food and Agriculture Organization (FAO)

The United Nations scale of privileges and immunities has also been generally followed in the case of a number of important regional international organizations. Examples which may be quoted (although in each case the relevant international agreement must be consulted to ascertain the differences from the United Nations precedent) include the North Atlantic Treaty Organization,[15] the Western European Union,[16] the Council of Europe,[17] and the Customs Cooperation Council.[18] **21**.21

Organizations with more limited privileges and immunities

The international financial organizations followed a different pattern. In the Agreements which established the International Monetary Fund[19] and the International Bank for Reconstruction and Development[20] (the Bretton Woods Agreements of 1944) it was recognized that if the Bank (usually known as the World Bank) was to be able to raise loans and perform certain of the other functions envisaged for it on international markets, it could not be accorded a general immunity from suit. Its immunity from suit was therefore limited to actions brought by Member States or by persons acting for or deriving claims from Member States. Ordinary commercial lenders could bring actions in the ordinary way to recover their loans, and this made the Bank a credible borrower in the market. The scale of privileges and immunities both for the Fund and for the Bank was in other ways notably more restrictive than the UN scale. For example no privileges or immunities were accorded to representatives of Member States, or to experts, nor was 'high officer' treatment accorded even to the executive head **21**.22

International Civil Aviation Organization (ICAO)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
International Monetary Fund (IMF)
International Bank for Reconstruction and Development (IBRD)
World Health Organization (WHO)
Universal Postal Union (UPU)
International Telecommunication Union (ITU)
International Refugee Organization (IRO)
World Meteorological Organization (WMO)
Inter-Governmental Maritime Consultative Organization (IMCO)
International Finance Corporation (IFC)
International Development Association (IDA)
World Intellectual Property Organization (WIPO)
International Fund for Agricultural Development (IFAD).

15 UKTS No 11 (1955).
16 UKTS No 42 (1957).
17 UKTS No 34 (1953) (extended by four later Protocols).
18 UKTS No 50 (1954).
19 2 UNTS 39 (Art IX at 72).
20 2 UNTS 134 (Art VII at 180).

of the Bank. On the other hand the Bank was given certain tax privileges—such as immunity for the collection or payment of any tax or duty and certain tax exemptions on any obligation or security issued by the Bank—which are peculiar to international agreements establishing financial organizations. The precedents of the World Bank and the International Monetary Fund were followed in the case of the International Finance Corporation,[21] the International Development Association,[22] the Asian Development Bank,[23] and the Caribbean Development Bank[24] among others. The first four of these organizations are covered by the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations. It must be emphasized that although the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies are very widely ratified, participation is not universal and the treatment set out in the Conventions will not be legally required from a State which is not a party.

21.23 Some international organizations were established with a minimal scale of privileges and immunities—usually on the basis that their functions were technical or to some extent commercial and not politically sensitive. They might be accorded only the legal personality which was essential if they were to hold premises and property and contract in the host State. The agreements under which the commodity organizations (such as the International Wheat Council, the International Sugar Organization, the International Coffee Organization, and the International Tin Council) were established contained provisions which accorded only the most limited privileges, namely tax exemption for each organization and tax exemption on emoluments for staff members. One regional organization, EUROCONTROL, was accorded very limited fiscal privileges in the expectation that financial equilibrium between Member States would be achieved by spreading the projected air traffic control installations evenly among their territories; but when this plan did not work out, there were complaints from some Member States that their contributions to EUROCONTROL's budget were finding their way into the coffers of other Member States where the organization was operating and was being heavily taxed. It became necessary to negotiate an amending Protocol providing for tax relief for EUROCONTROL on a wider basis.[25]

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21 264 UNTS (Art VI at 142).

22 UKTS No 1 (1961) (Art VIII).

23 UKTS No 53 (1968) (Ch VIII).

24 UKTS No 36 (1970) (Ch VIII).

25 See Convention relating to Cooperation for the Safety of Air Navigation (EUROCONTROL), 1960 UKTS No 39 (1963), Arts 21–7, and Additional Protocol to the Convention, 1970 (Cmnd 4499).

21.24 This example illustrates one of the most important justifications for the granting of privileges to international organizations and their staffs: the need for financial equality as between the host State to the organization and the other members. The host State should not be entitled to make, through the presence of the organization on its territory, a direct profit at the expense of other contributors to the budget of the organization. Of course the host State makes some indirect profit because representatives of other governments come there for meetings, bringing and spending foreign exchange; and there are other intangible benefits such as political prestige accruing to capitals which can attract a number of international organizations to set up house there. But it is generally accepted as wrong in principle that the host State should tax the salaries paid to officials out of the budget and keep the proceeds for itself, or that it should subject the organization to direct taxation or even to indirect tax in respect of its major purchases. (Individual officers do not enjoy tax-free salaries because most international organizations levy an internal tax on the salaries for the benefit of the organization itself.) The need for equality between Member States does not apply in the case of the diplomat's tax exemption. The diplomat is not generally exempt from such indirect taxes as value-added tax or purchase tax on the goods he buys, because this is administratively very difficult to arrange and the reciprocal nature of diplomatic relations means that no one government benefits overall at the expense of others. But in the case of international organizations there is no real reciprocity. If the host State could levy indirect taxes on an organization in its territory, or customs duty on its imports, it could profit at the expense of the other members without suffering any reciprocal loss. Of all the privileges accorded to international organizations, therefore, tax exemption is the most readily conceded.

21.25 Immunities for an international organization and its staff are harder to justify. In the case of a highly political organization such as the United Nations it is easy to see that its officials must be free from pressure and from harassment in the performance of their delicate and important tasks in the territory of members, just as it is essential for diplomats to be free and independent of pressures from the authorities of the receiving State. But international organizations have tended to multiply—though probably less so in recent years—and to assume functions such as the financing of international telecommunications systems,[26] or the development of rocket launchers,[27] or of better weather forecasting,[28] which are

[26] See Agreement relating to International Telecommunications Satellite Consortium (INTELSAT) UKTS No 80 (1973); and International Maritime Satellite Organization (INMARSAT).

[27] European Launcher Development Organization (ELDO).

[28] European Centre for Medium Range Weather Forecasts.

far removed from the functions of traditional diplomacy and may sometimes have a commercial dimension. The host State does not derive any reciprocal advantage in granting immunities to international organizations and persons connected with them, such as it obtains for its own representatives abroad when it accords diplomatic and consular immunities to foreign diplomatic agents. If persons enjoying immunity by virtue of their connection with an international organization behave unacceptably or cause a security problem in the host State, there is no swift and reliable method analogous to declaring a diplomat *persona non grata,* whereby that State can ensure that the offenders are immediately removed from its territory. This has been particularly sensitive in the United States and it was largely for this reason that the US—as already pointed out—delayed becoming a party to the General Convention on the Privileges and Immunities of the United Nations. There is also the problem that while a diplomat who claims immunity may at least in theory be sued in his home State or at the end of his diplomatic posting, this is not practicable with officers of an international organization who may well spend their entire career in the service of the organization. For these reasons it was seen as necessary, particularly in States where public and parliamentary opinion is sensitive to any apparently excessive grant of immunity, to make quite clear that immunities were not being granted beyond those which were necessary to enable the organizations concerned to function effectively, and that privileges and immunities would not be granted so as to enable any international organization to carry on a commercial activity from a position of advantage over its competitors.

21.26 The European States which negotiated the Protocol on Privileges and Immunities of the European Space Research Organization (ESRO) in 1963[29] and the Protocol on the Privileges and Immunities of the European Launcher Development Organization (ELDO) in 1964[30] were conscious that these were regional organizations of a technical and scientific character for which privileges and immunities on the United Nations scale would not have been appropriate. In the case of the latter body it was then envisaged that if a successful rocket launcher was developed, it should be constructed and sold on a commercial basis, and it was clearly inappropriate that in that event Member States should accord tax relief. These two international agreements therefore contained restrictive features which were at the time novel. Each organization was obliged to include in all its written contracts (other than staff contracts) an arbitration clause which either party to the contract might invoke. Unless the organization waived its immunity,

[29] UKTS No 39 (1968).

[30] UKTS No 28 (1967). These two organizations subsequently merged to form the European Space Agency.

Member States might submit to an international arbitration tribunal any dispute arising out of damage caused by the organization, or arising from a claim against a person connected with the organization who is entitled to immunity in regard to the claim. If an action was brought in the courts to enforce an arbitration award made under these provisions, the organization had no immunity from jurisdiction and execution. Other important exceptions to the immunity from jurisdiction and execution of the organization were where a civil action was brought against the organization by a third party for damage arising from an accident caused by a motor vehicle belonging to the organization or operated on its behalf, or there were criminal proceedings for a motor traffic offence involving a vehicle which belongs to the organization or is operated on its behalf. So although ESRO and ELDO could not be obliged to litigate disputes in the courts in the ordinary way, most people with a claim against them could be sure of obtaining justice, since they could be required to submit to arbitration and the resulting award was enforceable. Motor traffic offences and claims form an overwhelming proportion of the proceedings in respect of which immunity is raised, and there is considerable public reluctance to widen the classes of person who are thought of as being in some sense 'above the motoring laws'. ESRO and ELDO were accorded the standard exemptions from taxation and customs duties, but stress was laid on such exemptions relating only to matters which are 'strictly necessary' for the exercise of their official activities. These official activities are defined precisely, and it was made clear in the case of ELDO that they included only 'administrative activities and the design, development and construction of prototype space vehicle launchers'.

21.27 The immunity from jurisdiction of both officers of the organization and experts was subject to an exception in regard to motor traffic offences and claims resulting from motoring accidents, parallel to the above exceptions regarding the organizations themselves. The tax exemption given to the executive head and the staff members of each organization in regard to their salaries and emoluments was made conditional on their paying tax to the organization itself, the tax collected to be used for the benefit of the organization. The practical advantages of this 'internal tax' arrangement are that:

1. Equality is created between the different members of an international secretariat (which would not occur if the staff members were paying tax at varying rates to their home government);
2. The host State is not making a tax profit as it would do if it could tax staff members on the basis of their residence in its territory;
3. The staff members do not enjoy a tax-free status which might be resented by public opinion, particularly in the host State.

The general approach of these two international agreements was reflected in Article 21 of the ESRO Protocol, which provided:

> 1. The privileges and immunities provided for in the present Protocol are not designed to give the Director-General, staff members and experts of the Organisation personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded.

Study of Underlying Principles

21.28 In 1965 the United Kingdom government expressed to other governments in the Council of Europe the considered view that in the negotiation of agreements concerning privileges and immunities for international organizations too much regard was being paid to precedent and to equality of status with other organizations, and that States which wished to attract international organizations to establish themselves in their territory had on occasion used privileges and immunities as a bargaining counter. Insufficient regard was being paid to the basic principle that 'no privileges and immunities which are not really necessary should be asked for'.[31] As a result of this initiative a careful study of the whole question of the principles which should govern the grant of privileges and immunities to various categories of international organization and to persons connected with them was made by a sub-committee of the Council of Europe. The report which resulted from this comparative study and discussion of future policy was endorsed by the Committee of Ministers of the Council of Europe, who recommended 'that the governments of member states should be guided by the considerations set out in the report in any future negotiations concerning privileges and immunities of international organizations'.[32] The governments of the Council of Europe for some time thereafter followed a reasonably coordinated policy in the negotiation of agreements regarding new international organizations, although it could not be said that questions of precedent and status did not sometimes continue to surface. It is unfortunate that the negotiators of agreements for new international organizations usually include those individuals who stand to benefit most from generous treatment in matters of status as they are hoping to work for or be delegates to the organization. Nor has it ever proved feasible to re-negotiate any existing international agreement on privileges and immunities in a downward direction.

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[31] General Assembly resolution of 13 February 1946.

[32] Resolution (69) 29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969 and *Explanatory Report* (1970).

A strong incentive to a more disciplined and restrictive approach to the negotiation of new agreements conferring immunities has also emerged from a number of cases brought before the European Court of Human Rights in which it was argued that the human right of access to justice overrode—particularly in cases where torture was alleged—traditional immunities enjoyed by States. The European Court of Human Rights has upheld these immunities, stating 'that the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'. They stressed however that it would always be necessary to establish that the barring of a civil right is not disproportionate to the legitimate aim which state immunity pursues: and that there must be proportionality between limitations on access to justice and the aim pursued.[33] **21.29**

A method used to justify immunities for international organization in the face of charges of denial of access to justice is to provide in the constituent instrument an alternative method for settlement of disputes. For example, the 1947 Convention on the Privileges and Immunities of Specialized Agencies of United Nations confers immunity except where there is express waiver by the organization,[34] and requires each Specialized Agency to make provision 'for appropriate methods of settlement of: (a) disputes arising out of contracts or other disputes of a private character to which the specialized agency is a party; (b) disputes involving any official of a specialized agency who by reason of his official position enjoys immunity, if immunity has not been waived'. Such alternative procedures provide a means of settlement of claims without compromising the independence of the organization or exposing it to interference from the receiving State. Nonetheless the total exclusion of national courts' jurisdiction has been adversely contrasted with the restricted immunity now enjoyed by States where national courts exercise jurisdiction over disputes relating to commercial or private law acts; and employees in reliance on the right of access to court in the European Convention on Human Rights have successfully challenged in French and Belgian courts particular alternative dispute settlement proceedings by reference to their method of selection of judges and absence of a right of appeal.[35] **21.30**

[33] *Al-Adsani v United Kingdom,* 34 EHRR 11; *Fogarty v United Kingdom,* 34 EHRR 12; *McElninney v Ireland and United Kingdom,* 34 EHRR 13.

[34] Article III s 4. It is expressly provided that 'no waiver of immunity shall extend to any measure of execution'.

[35] *Waite and Kennedy v Germany* 26083/94 [1999] 30 EHRR, 118 ILR 121; *Banque Africaine de Developpement v Degboe*, France Court of cassation, ch. Sociale, 25 January 2005 JDI (2005) 1142 n. Corbion; (2006) 110 *RGDIP* 217 n. Nicholas Houpais; *ENTICO v UNESCO and Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 531, [2008] 1 Lloyd's Rep 673.

Headquarters Agreements

21.31 The status of an international organization and of persons connected with it may be regulated by a bilateral international agreement between the organization and its host State. This headquarters agreement, as it is called, may be

1. in addition to the multilateral agreement which specifies the privileges and immunities to be accorded by all Member States;
2. in substitution for the multilateral agreement if the host State is not a party to that agreement; or
3. required because the multilateral agreement may contain no detailed provisions in regard to privileges and immunities.

21.32 An example of (1) (a headquarters agreement which supplements and makes only minor adjustments to the relevant multilateral agreement) is the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Centre for Medium-Range Weather Forecasts.[36] The purpose of the Headquarters Agreement in this case was to make the necessary provision regarding the premises which the United Kingdom government placed at the disposal of the Centre and also to spell out in terms of United Kingdom law and practice the privileges and immunities to be accorded to the Centre. On the other hand, in the case of the Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Intergovernmental Maritime Consultative Organization (now the International Maritime Organization) regarding the Headquarters of the Organization (1968),[37] certain additional financial privileges were accorded to the senior officers of the organization which were not required by the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations. This Agreement also set out in detail the way in which the broad terms of the Specialized Agencies Convention were interpreted in United Kingdom law, practice, and procedure. This was the first headquarters agreement to be concluded between the United Kingdom and an international organization, and it required primary legislation (the International Organizations Act 1968) before it could be brought into force.

21.33 Examples of (2) (headquarters agreement required because the host State is not party to a multilateral agreement on the status of the organization) include the 1947 Agreement between the United States of America and the United Nations

[36] UKTS No 2 (1976).
[37] UKTS No 18 (1969).

regarding the Headquarters of the United Nations[38] and the Headquarters Agreement between Switzerland and the United Nations.[39] Until 2002, Switzerland was not a member of the United Nations.

21.34 Headquarters agreements in category (3) (where the multilateral agreement contains no detail on privileges and immunities) usually relate to international organizations which do not need privileges and immunities except in the host State. In such a case the multilateral agreement which establishes the organization may make no provision in regard to privileges and immunities; may make provision only in general terms (for example 'shall be accorded in the territory of Member States such privileges and immunities as it may require'); or may expressly provide that the organization and the host State shall conclude a headquarters agreement regarding privileges and immunities to be approved by the council or other executive body of the organization. The last of these formulations, which has become the most common, is the most satisfactory, since it emphasizes the interest of the generality of members in the level of privileges and immunities to be accorded and prevents the possibility of the secretariat of the organization negotiating an unacceptably high level of privileges and immunities with one Member State and using this as a precedent in competitive negotiations with other members. The United Kingdom has concluded headquarters agreements with all of the commodity organizations which have their headquarters in London.[40] In each case the relevant multilateral agreement called for the negotiation of a headquarters agreement between the host State and the organization (there being little general need for privileges and immunities in other Member States, except as regards taxation of the organization) and the agreement, which followed generally the precedents of ESRO and ELDO described above, was approved by the Council of each organization before signature. Where the organization does not have a widespread need for privileges and immunities, this scheme is an economical way of providing what is necessary. The negotiation of multilateral agreements on privileges and

[38] 11 UNTS 11. The US acceded to the General Convention in 1970.

[39] 1 UNTS 163.

[40] The first five were the Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Wheat Council, UKTS No 14 (1969); Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Sugar Organization, UKTS No 88 (1969); Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Coffee Organisation, UKTS No 86 (1969); Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Tin Council, UKTS No 38 (1972); Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Cocoa Organization, UKTS No 94 (1975).

immunities consumes a great deal of expert time and effort, and where an organization operates almost entirely within one Member State, a simple headquarters agreement between the host State and the organization will be sufficient.[41]

The 1975 Vienna Convention on the Representation of States

21.35 The sequence of international conferences designed to codify the various areas of diplomatic law which began with the Vienna Convention on Diplomatic Relations of 1961 and continued with the Vienna Convention on Consular Relations of 1963 and the New York Convention on Special Missions of 1969, led to the convening of a conference at Vienna in 1975 to consider draft Articles prepared by the International Law Commission on representatives of States to international organizations. This Conference adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,[42] a Convention which has never entered into force. Part II of the Convention accords to permanent missions to international organizations of a universal character broadly the privileges and immunities of a diplomatic mission, and goes further in requiring the host State, in case of an attack on the premises of the mission, to 'take all appropriate steps to prosecute and punish persons who have committed the attack'. The head of the permanent mission, staff, and families are given the privileges and immunities which they would enjoy if they occupied a corresponding position in a diplomatic mission. Although some headquarters agreements give more extensive privileges and immunities to permanent missions to the organization than are required by the relevant multilateral agreement, most fall well short of the full range of diplomatic privileges and immunities.

21.36 Part III of the 1975 Vienna Convention deals with delegations to organs of organizations and to conferences and again, with some exceptions, such delegations are given privileges and immunities on the full diplomatic scale. The general level of privilege and immunity goes far beyond what is accorded under the General Convention on the Privileges and Immunities of the United Nations, or under any bilateral headquarters agreement, to delegations to organs of an international organization or to conferences convened by it. The host State has no power to declare any person entitled under Part III to

[41] For a wide survey of practice, see A S Muller, *International Organizations and their Host States* (Kluwer, 1995).

[42] Text in UN Doc. A/CONF.67/16, and in (1975) 69 *AJIL* 730.

immunity *persona non grata,* or to obtain his removal, if the sending State proves unhelpful. Part IV of the Vienna Convention provides that observer delegations are entitled to the same level of privileges and immunities as the delegations of members which are covered in Part III.

21.37 In the drafting of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, little regard was paid to the interests of the traditional host States—the United States, Canada, and the States of Western Europe. Although all States are potential host States to international organizations and even more so to conferences convened by such organizations, the majority of States adopted the position that they were primarily sending States, and a polarization of positions occurred in which the majority supported extension of the privileges and immunities normally given to representatives to international organizations, while the traditional host States argued that their legitimate interests, and the traditional principle that no privileges and immunities should be accorded unless they were necessary, were both being ignored. When the Convention was adopted, the United Kingdom, Switzerland, Austria, Canada, France, and the United States abstained and it is unlikely that it will obtain sufficient participation to enter into force or have any impact on state practice.

Visiting Armed Forces

21.38 One particular situation, the deployment of armed forces on territory other than their home State, has resulted in the adoption of special international arrangements quite separate from those which governed international organizations engaged for the most part in peaceful activities. In both the First and Second World Wars it became necessary to draw up agreements for the allocation of jurisdiction and settlement of disputes between the visiting armed forces of the sending State and the receiving State which had consented to their presence on its territory. Originally most of these agreements (termed status of forces agreements, or SOFAs) were bilateral agreements between sending and receiving States, and there are still many of those such as the agreements concluded by Iraq following the restoration of its sovereignty in 2004 with US and other coalition forces present in Iraq under UN mandate. But in the context of multilateral deployments, often within the framework of an international organization, multilateral agreements have come to dominate the field. Modern practice has led to the development of three separate models:

(1) where the armed forces are present in peacetime in another State's territory (NATO SOFA);

(2) where an international organization mandates a force—military, civilian, or combined—provided by Member States, to carry out a mission on a particular State's territory (UN military observer missions and peacekeeping operations); and
(3) model SOFAs and status of mission agreements (SOMAs) recently developed by the European Union first to define the legal status of Member States' forces deployed within the territory of EU Member States and secondly for such Member States' forces deployed in third States for humanitarian and rescue tasks, crisis management and peacekeeping ('the Petersberg tasks'—see paragraph 27.25 below).

The NATO SOFA

21.39 The first model is designed for the situation which obtained throughout the Cold War where the armed forces of one State were stationed on a long-term basis in peacetime with the consent of another friendly State in its territory for the purpose of their collective security. This was reflected in the North Atlantic Treaty referred to above which set up a Supreme Allied Headquarters in Europe (SHAPE) with a Supreme Allied Commander Europe (SACEUR). The overlap of jurisdictions and the potential conflict between the local interests of the receiving State, particularly regarding its exercise of jurisdiction over all activity within its territory in peacetime, and of the functional need of the visiting State to have exclusive command of its force and its internal administration, called for careful balance. In response the NATO Status of Forces Agreement (NATO SOFA) was drawn up, regulating the allocation of competing jurisdictions between the two States over acts carried out by visiting forces, and making provision for claims for damage resulting from their activities and for the settlement of disputes between sending and host States.

Allocation of jurisdiction: criminal jurisdiction

21.40 Detailed rules were drawn up in respect of entry and departure of forces; use of vehicles, goods, and services; taxes; and customs. Article VII deals with the exercise of criminal jurisdiction and Article VIII with waiver of claims and the exercise of civil jurisdiction. These Articles are complicated and have been the subject of much practical application as well as academic comment.[43] As regards criminal proceedings the basic principle is one of concurrent criminal

[43] D Fleck and S Addy, *The Handbook of the Law of Visiting Forces*, ch IV 'The Status of Forces, Jurisdiction' 108 *et seq*; A Sari, *The Jurisdictional Immunities of Visiting Forces under Public International Law: A Case Study of the European Security and Defence Policy* (2008 University College London doctoral thesis) chs 4 and 5.

jurisdiction of the sending and host States with the priority right to exercise jurisdiction being based on the nature of the offence and the identity of the offender. Thus the offences by military personnel of the sending State which arise out of any act or omission in the performance of official duties are subject to the primary jurisdiction of the sending State, as are also offences against the property or security of the sending State or of a member of a force, civilian component, or dependent, and which arise out of any act or omission in the performance of official duty. In 1998, for example, a NATO fighter plane on training exercises struck a ski lift cable in Italy causing the death of 20 skiers, and the pilot was later tried and acquitted of manslaughter by a military court in the United States. Other offences, and in particular those against nationals of the host country, are subject to the primary jurisdiction of the host State. The authorities of whichever State has the primary right are required to give sympathetic consideration to a request for a waiver of its right by the other State where the latter considers such waiver to be of particular importance.

Allocation of civil jurisdiction

21.41 There is no general allocation of civil jurisdiction in the NATO SOFA; instead there is a general waiver by both States of all claims for damage to any property owned or used by it caused by a member of the armed services in the execution of his duties. It also contains a provision relating to respect for the laws of the receiving State and a prohibition against execution (but not the giving) of a judgment against a member of a force or a civilian component in connection with acts done in performance of official duty. In general creditors and victims are left to rely on the domestic legislation of the host State since there is no provision in the agreement for the exercise of civil jurisdiction by the sending State.

NATO SOFA a model for later agreements on visiting forces

21.42 By reason of its even-handed treatment of the interests of the sending and host States and the participation of the foremost military power, the United States, the NATO SOFA has received widespread acceptance—sometimes with some amendments—as a model for later bilateral and multilateral agreements relating to the deployment of armed forces abroad. The Partnership for Peace (PfP) SOFA of 19 June 1995 adopts the entire text of the NATO SOFA requiring its 39 States Parties (which included East European States some of whom later became candidates for NATO membership) to apply the NATO SOFA among themselves as if they were parties to it. EUROFOR, a rapid reaction force served by an integrated headquarters, also employs a SOFA drawn up on the same principles as the NATO model of concurrent jurisdictions in respect of the forces placed at its disposal.

The UN General Convention on Privileges and Immunities and the UN SOMA

21.43 Although, as explained above, officials and experts working on specific tasks on behalf of the United Nations are covered by the UN General Convention on Privileges and Immunities, this protection has not been found adequate to cover the circumstances of deployment of UN military or civilian missions into crisis situations. The United Nations, following the authorization by the Security Council of military observer missions or peacekeeping contingents, first began to negotiate and apply Status of Mission Agreements (SOMAs) to regulate the deployment of military missions which spelt out the consent of the host State and dealt with questions of jurisdiction and liability for damage. In these situations an initial arrangement devised to cover the deployment of UNEF in 1956 following the armed attack on Egypt by Israel has been standardized into a Model UN SOMA. This agreement sets as a precondition the prior consent of the State in whose territory there is to be a deployment of the force, and applies a principle of the exercise of unified command and control over operations by the UN with specific requirements as to the use of force beyond self-defence. The level of protection granted varies according to the circumstances of the operation, whether for collective self-defence, humanitarian assistance, or training and establishment of local security and civil administration. The greater the security risks of a particular deployment the more likely will be the conferment by the relevant SOMA of absolute immunity on military personnel from criminal jurisdiction of the receiving State and immunity from civil jurisdiction for acts committed in performance of official duties. As under the UN General Convention on Privileges and Immunities high-ranking officials are granted a status equivalent to that of diplomatic envoys under international law, UN officials seconded to the force retain the immunities enjoyed under the UN Convention and military observers and civilian advisers enjoy the status of experts. Specific rules in the UN SOMA cover the military personnel of the UN force in respect of their activities in the host State. The UN SOMA has been applied to UN operations in Mozambique, Rwanda, Central African Republic, Darfur, and Ethiopia and adopted by other organizations, as with NATO with regard to the Implementation Force (IFOR) and the Stabilization Force (SFOR) in Bosnia and Herzegovina and by the African Union with regard to observer and confidence-building missions in Sudan and Darfur.

21.44 The absence of a single legal regime for visiting armed forces and the many variations of SOFAs and SOMAs are explained by the diverse objectives pursued by visiting forces and missions (from ceasefire operations to training in national institution building), considerations of military necessity, and political and cultural disparities between sending and host States. However, features common to

all the agreements are the functional basis of the immunities conferred, the exclusive competence of the sending State over discipline, and internal administration of the force, with the host State permitted to exercise criminal jurisdiction to only a limited extent where its public order or interests are specially affected by actions of the visiting forces.[44]

EU SOFA and EU SOMA

21.45 Over the past 10 years since the European Security and Defence Policy (ESDP) began to become operational, the EU has increasingly authorized deployment of forces of its Member States, first within the territory of other EU Members, and secondly in the territory of non-Member States. In consequence the EU has sought to clarify the conditions under which forces of one Member State are deployed on the territory of another and also to standardize the nature and terms of the agreements concluded with non-Member host States and with States contributing personnel for ESDP tasks and missions. The first EU agreement, the EU SOFA, has been devised to define the legal status of military and civilian forces of EU Member States deployed within the geographical ambit of the EU and within the territory of EU Member States. The different capacities in which the military and civilian personnel employed for the purpose of the European Security and Defence Policy (ESDP) perform their duties means that the privileges and immunities may attach to their sending States or to the EU. In one text the EU SOFA has sought to cover these different situations; whereas staff seconded to the institutions of the EU perform their duties in an international capacity on behalf of the EU, the armed forces and headquarters made available to the EU for the purposes of the ESDP are not formally incorporated into the structure of the Union. They continue to act in a national capacity and on behalf of the sending Member State unless they can be equated to an organ of the EU during their participation in activities within the context of the ESDP. Clearly this considerably complicates the determination of the primary jurisdiction and the authority entitled to grant a waiver. Given further that the term 'official duty' is not defined in the EU SOFA, though the immunity from jurisdiction is frequently dependent on the contested acts being in performance of official duties, and that Austria, Finland, Hungary, and Sweden have all made statements restricting the right of the competent authorities of the sending State to exercise jurisdiction within the territory of the receiving State, the application of these

[44] A Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice' (2008) 19 *EJIL* 67.

agreements is not always straightforward and as yet there is little practice on their interpretation.

The EU SOMA

21.46 The EU SOMA has been developed to provide for the exercise of jurisdiction and the privileges and immunities of Member States' forces when deployed in crisis management missions in non-Member States. In addition to military peace-keeping missions, many EU authorized missions have been for civilian purposes such as police training, rule of law development, monitoring of elections or of human rights performance, or border strengthening. Most of these missions have been launched to support EU or international donor programmes and activities already in place. The express consent of the third State to the deployment of the mission has always been required. Civilian missions are funded from the budget of the European Union whilst the costs of military operations have been borne by the EU Member States contributing forces.

21.47 To eliminate the need for the Council of Ministers to issue a fresh negotiating mandate for each new EU crisis management mission it has adopted a Model SOFA and SOMA but has continued the practice in its original SOMAs of requiring the privileges and immunities equivalent to those enjoyed by diplomatic missions and agents under the Vienna Convention on Diplomatic Relations to be conferred on military and civil personnel of the sending State and a complete exemption of both the civil as well as the military personnel from the criminal jurisdiction of the host State. These terms were first negotiated with non-Member States not in a position to protest and where operational conditions were physically dangerous (for example Bosnia and Macedonia), but it has been criticized from within the Union itself and—for the reasons set out above in paragraph **21**.29—is controversial on grounds of denial of access to justice for potential claimants.[45]

The underlying principles in status of forces agreements

21.48 While considerations of military necessity and political disparities between the sending and host States have prevented the emergence of a single legal régime applied universally to all deployment of visiting forces, the types of agreements discussed above support the recognition of three common underlying principles: functional immunity restricting the conferment of protection for the public

[45] Sari, n 44 above, and 'The Conclusion of International Agreements by the European Union in the context of the ESDP' (2008) 57 *ICLQ* 53.

function for which it is undertaken and not for the personal interests of the members of forces or missions; operational exigency by which the powers over discipline, security, and the internal administration of the force are reserved to the commander and to the State supplying the military force; and prerogatives to secure the continued functioning of the force as an effective military authority in the territory of the receiving State.

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22

THEORY OF MULTILATERAL DIPLOMACY

22.1 As well as the legal aspects of multilateral diplomacy, dealt with in the preceding chapter, theories about its role—shaping the public perceptions of its institutions—merit consideration. The multilateral approach to diplomacy became increasingly common post 1945. It was partly a generic consequence of the modern state system, and partly a response to the challenges of the post-war period when the Bretton Woods institutions and the United Nations were finding their place. United States leadership was influential as a means of addressing economic, financial, and collective security challenges. The multilateral approach became increasingly common, not just in formal organizations within the UN system, but as regional/global efforts grew to address issues which concerned many countries, and were not confined to the territory of one State. Indeed the responses required cooperative action by many. Paradoxically this evolution of cooperative action helped to consolidate and extend sovereignty norms, territorial integrity, and the equality of States, while nevertheless helping to facilitate peaceful change.

22.2 There is no single definition of multilateralism and yet it is easily recognizable. It involves the importance of rules, institutionalized collective cooperation, and inclusiveness among the members of the group, who in turn decide who should belong. According to Keohane,[1] a truly global multilateral organization is open to States meeting specified criteria, embodied in publicly known rules that constrain activity and shape expectations of members, and allocate roles. While Ruggie[2] has defined it as 'action among three or more states on the basis of generalised principles of conduct . . . which offers members a rough equivalence of benefits in the aggregate and over time'. In essence too, multilateralism was seen as an effective, efficient technique to foster cooperation between independent States when the transaction costs of a multiplicity of bilateral agreements would

[1] R O Keohane, *Garnet Working Paper,* University of Warwick, 09/06 (1992).
[2] J Ruggie, *Multilateral Organization* (MIT, 1992) 561–98.

be high, and when States are prepared to negotiate a beneficial outcome, often with no particular result favoured in advance. In general, multilateral institutions do not supersede States as the most important actors. After all they have been created by States and States dominate their decision-taking. They do reduce the costs of making and enforcing agreements, help share information about other States' policies, and encourage States to live up to their commitments. The result benefits international law and often encourages domestic reforms leading to better governance. Multilateralism began more as cooperation in defined areas, mutual agreement by a group of States to implement agreements, sometimes with a degree of enforcement but not governance. Over the years, the architecture of multilateralism has become more varied, more comprehensive, and an element of governance has emerged. This last dimension raises the acceptability of process to justify actions. Multilateralism therefore shows different stages of development:

- institutionalized, where rules-based international organizations are established. The World Trade Organization is an example.
- emerging areas, where new international rules and organizations are being established, often driven by events. Examples are the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court, and the continuing effort to deal with climate change.
- aspirational recommendations, where in the absence of binding rules, norms should inform foreign policy behaviour.
- a system of supranational law and multilateral governance, as in the European Union.

22.3 The routes by which States come to favour multilateralism are varied.[3] Some States are individualistic, entering into contractual relations in a rational self-interested way. For others it may stem from the identity/power of the State, its beliefs and norms, capacity to persuade and be persuaded. Still others favour an approach which gives primacy to institutions and processes and where state sovereignty is more a relational concept than an absolute.

22.4 Legitimacy is a crucial element in the acceptability, and indeed durability, of a multilateral organization. This can stem from a normative process where practices and aims meet a set of defined values and standards that have been defended and furthered. Or it can result sociologically, a matter-of-fact legitimacy when the organization's actions are accepted as appropriate and worthy of being respected by relevant audiences. These coincide naturally when the relevant audience endorses the normative aspect too. Achievement of legitimacy can be

[3] J A Caporaso, *Multilateral Organization* (1992) 599–632.

assessed in two ways. Firstly, if the results of action by the organization achieve its purposes, eg if the United Nations Security Council produces improved international peace and security in a given crisis. Secondly, if the process of decision-taking is accepted by the audience, which is itself sufficiently representative, diverse, and inclusive.

22.5 Discussion of legitimacy relates more to the action of States than it does to the responses of individuals. International organizations often fail to meet today's expectations of democracy and accountability in the way that governments aim to do. This challenge to the multilateral approach is in part a challenge to the State. Security problems are now more intra- than interstate. Trade and economic activity is predominantly private-sector and less easy to regulate. Civil society and non-governmental organizations are more international, drive global norms, and monitor performance. Human rights and governance issues intrude on state sovereignty. Against that background, organizations tend to justify their actions by arguing that governments act according to their own national procedures and that legitimacy stems from the collective decisions of a diverse membership.

22.6 Today's United Nations has a particular legitimacy, stemming from universal membership of 192 States, founded on the basis of sovereign equality rather than democratic principles. It tackles challenges that no one State can solve, takes its decisions by agreed processes, often based on obtaining a consensus of members, that is to say, with no State objecting. Hopefully, the results too justify the action. The Security Council can provide legitimacy for the use of armed force in circumstances going beyond the right of a State to self-defence, including collective defence. Ultimately, the justification of the United Nations is that it reflects an imperfect real world which sits between unconstrained power politics and Panglossian peace and harmony. As Dag Hammarskjold, the second secretary-general, put it 'it was created not to take humanity to heaven, but to save it from hell'.

22.7 How then does multilateral performance rate? Critics point to security failures in many conflicts. The efficiency of service delivery is easily criticized. There are persistent abuses of human rights, civil wars, failed States, post-conflict recidivism as fighting again breaks out, and continuing threats from weapons of mass destruction. The United Nations seldom acts with the efficiency of a single State, and is often portrayed as slow and bureaucratic. Sometimes effective multilateral action follows unilateral state action, eg UN action in Bosnia followed that of the United States. Again, critics argue that many of the States taking decisions are themselves either undemocratic or only partially democratic.

22.8 In an imperfect world advantages and disadvantages of the multilateral approach are evident. Daily, international organizations and the UN family demonstrate

the good that results from their work. The goal is to agree and implement effective policies to cope with the myriad of challenges which confront the world. Judgment is made on the basis of successful action, but also on those cases where the international community failed to act.

22.9 Multilateralism in the twentieth century provided institutionalized collective action to deal with security threats, development, human rights, and so on. Legitimacy demands were modest and action was seldom intrusive against the wishes of an individual Member State. This century's challenges are greater, more diverse, and in many ways more difficult, demanding, and intrusive. It is not only to combat weapons of mass destruction, but to eliminate terrorism and the risk of terrorists obtaining such weapons. How are the weak and vulnerable to be protected when their own government cannot protect them, or worse, is itself the agent for their oppression? Policy prescriptions are likely to be more intrusive of state sovereignty and therefore more difficult to agree and implement.

22.10 History shows that multilateralism, its forms and institutions, have evolved, although not sufficiently. Kohler[4] has pointed out that historically States have sought to protect their interests by insisting on unanimity for decisions, thus limiting effective decision-taking. As power shifts, as challenges and priorities change, as external and internal dynamics move, as the financial world becomes one, as civil society and global multinational corporations flex muscles, and as the norms and values of what constitutes international society become more relevant, so multilateral institutions must adapt and change further. That in essence is the test for the multilateral diplomat. Conferences, a principal mechanism for multilateral diplomacy, are dealt with in Chapter **34** below.

[4] M Kohler, *Multilateral Organization* (1992) 681–708.

23

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23.1 It would be idle to pretend that the UN is an uncontroversial body, though widespread ignorance of its workings contributes to this. Without some knowledge of its history it is particularly difficult to understand the UN's present situation.[1] Its principal predecessor, the League of Nations, established in 1919, had been notably unsuccessful, failing to have any significant impact on the events leading to the outbreak of the Second World War in 1939. With the end of the Second World War and the formation of the United Nations, the League of Nations brought its life to a close in 1946, bequeathing certain of its less political responsibilities to the new body.

23.2 The term 'United Nations' derives from the 'Declaration by United Nations' of 1 January 1942, in which the 26 nations then fighting against the

[1] For a perceptive insider's view see Lord David Hannay, *New World Disorder* (London: I B Tauris, 2008).

German-Italian-Japanese Axis affirmed their resolve to cooperate in winning the war and their adherence to the Atlantic Charter. That Charter, proclaimed on 14 August 1941 by the president of the United States, Franklin D. Roosevelt and the prime minister of the United Kingdom, Winston Spencer Churchill, looked forward to a peace affording to all peoples freedom and security from aggression.

23.3 Before any formal steps were taken internationally to set up a new world political and security organization, a conference in the name of the United Nations was held in May and June 1943 at Hot Springs, Virginia, USA, at the invitation of President Roosevelt. It was called under the title 'United Nations Conference on Food and Agriculture' and it was attended by representatives from 44 countries. Its mandate was purely advisory, but the Conference led directly to the establishment in October 1945 of the Food and Agriculture Organization of the United Nations (FAO).

The Charter

23.4 The first formal international discussions with the objects described in paragraph **23**.2 were held at Dumbarton Oaks, Washington, DC, in the summer of 1944, between representatives of the United States, the United Kingdom, and the Soviet Union. They were followed by similar talks between the United States, the United Kingdom, and the Republic of China. (The Soviet government refused to participate with the Nationalist Chinese in these preliminary meetings.) Further discussions took place at the Yalta Conference in February 1945, attended by President Roosevelt, Marshal Stalin, and Prime Minister Winston Churchill. Those talks resulted in a text of a draft Charter[2] for presentation to the forthcoming United Nations Conference on International Organization which opened in San Francisco on 25 April 1945.[3] Extensive argument also took place between the greater and smaller Powers over the Dumbarton Oaks proposals as modified at Yalta; some concessions were thereby achieved by the smaller Powers, but in the main the Great Power proposals stood. The Charter was signed on 26 June by representatives of all the 51 nations taking part in the Conference, except Poland, which signed on 15 October. The requisite number of ratifications having been received, the Charter went into force on 24 October 1945.

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[2] It is generally accepted that the word 'charter' originated in the group in the United States State Department engaged, under the supervision of Dr Leo Pasvolsky, in the preparation of documents and drafts for the Dumbarton Oaks talks. The alternative word 'covenant' was rejected as reminiscent of the failure of the League of Nations. See Chapter **36**, paragraph **36**.4.

[3] See paragraph **23**.37.

Membership

The names of the original membership of 51 are below[4] and of current members will be found at <http://www.un.org/members/list.shtml>. **23**.5

Members are admitted under Article 4.1 of the Charter, which reads as follows: **23**.6

> Membership in the United Nations is open to all other peace-loving states [i.e. other than original members] which accept the obligations contained in the present Charter and, in the judgement of the Organisation, are able and willing to carry out these obligations.

Admission is effected by a decision of the General Assembly upon the recommendation of the Security Council. This means at least unanimous acquiescence by the permanent members, and as the number of members has grown, so membership of sovereign States applying pursuant to Article 4.1 has become more or less automatic.

Principal organs

The principal organs of the United Nations are: **23**.7

The General Assembly
The Security Council
The Economic and Social Council
The Secretariat
The Trusteeship Council
The International Court of Justice.

The International Court of Justice is considered in Chapter **30**. Comments on the operations of the other organs are given in the following paragraphs.

The General Assembly

The General Assembly is the only organ in which all members of the United Nations are directly represented. The Assembly is charged to discuss and make recommendations about any matter within the scope of the UN Charter. This has included the development of international law and its codification, as well as promoting international cooperation in the economic and social areas, and also human rights. It also receives and notes reports from the Security **23**.8

[4] Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, South Africa, Syrian Arab Republic, Turkey, Ukraine, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia.

Council and other bodies, and it is the Assembly which approves the budget of the organization. While the Assembly's sphere of activity is thus as wide as the Charter itself, in essence, apart from household questions (budgets, elections, appointments, etc) and affirmations of corporate views (eg on racism), it is a recommending and not a deciding body. Under Article 11.1 the General Assembly

> may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

But even this broad function is circumscribed by Article 12.1, which lays down that:

> [w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

However, this limitation,[5] intended in the main to avoid confusion, has not been difficult to circumvent by procedural devices.

23.9 The preceding paragraph has placed necessary emphasis on the limitations imposed by the Charter on the General Assembly in the matter of taking decisions. The corollary is that if the Assembly discusses and adopts a resolution which it is known in advance will be unacceptable to the Security Council then there will be no prospect of the Council, as the competent organ, authorizing action on that resolution. But there can nevertheless be a significant political impact by the passage by a large majority in the Assembly of such a resolution on a major or highly topical matter.

23.10 The Assembly, like all other organs, is bound by the 'non-intervention' section of the Charter. Article 2.7 reads:

> Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[6]

Meetings

23.11 The Charter provides (Article 20) for the Assembly to have to meet in regular annual sessions and in 'such special sessions as occasion may require'. Such sessions can be convoked at the request of the Security Council or by a majority

[5] The effect of the limitations on the powers of the Assembly to act in a situation in which the Security Council may not be able to do so is referred to in paragraph **23**.9 *et seq*.

[6] See paragraph **23**.29.

of members. The General Assembly now meets in regular sessions at United Nations Headquarters in New York beginning with a ministerial element starting on the third Tuesday of September. In addition, the 'Uniting for Peace' resolution (1950) made specific provision for meetings at short notice.[7]

Structure of the General Assembly

Main committees

23.12 The final authority within the General Assembly is the Plenary Meeting which can be called at any time during a session. At the next level the Assembly has set up six main committees on which each member country may be represented by one person. (No limit beyond that of space is placed on the number of advisers present.) The committees are:

First Committee: Disarmament and International Security
Second Committee: Economic and Financial
Third Committee: Social, Humanitarian and Cultural
Fourth Committee: Special Political and Decolonization
Fifth Committee: Administrative and Budgetary
Sixth Committee: Legal.

Procedural committees

23.13 These are two in number.

The General Committee. This Committee consists of 28 members, namely the President of the Assembly, who presides, and the 21 vice-presidents, together with the Chairmen of the six main committees.[8] It occupies a position in the structure which gives it some influence, since it assists the President of the Assembly over the arrangement of the agenda, including additional items presented for admission over and above those originally accepted.[9] It can also in theory tender general advice to the president on the handling of the sessions: in practice, its advice covers procedural issues and it may not decide political questions.

23.14 *The Credentials Committee.* This is a committee of nine members, appointed at the beginning of each session by the General Assembly on the proposal of the

[7] See paragraph **23**.41.

[8] Selection of Vice-Chairmen of the Assembly and Chairmen of Committees is carried out by negotiation, first within and then between 'blocs'. The electoral process starting with the President may be protracted. The Assembly specified in Resolution 33/138 of 19 December 1978 that the number of vice-presidents should in future be 21, distributed in agreed proportions between African and Asian, Eastern European, Latin American, Western European, and other states, and permanent members of the Security Council. A comparable system has also been worked out for the choice of the six chairmen of the Main Committees.

[9] The Soviet Draft Resolution on non-self-governing territories of 1960 was a case in point.

president. It examines the credentials presented by the leaders of the delegations to the particular session and reports on them to the Assembly. It is particularly responsible to report in those cases where the admission of a member has been challenged.

23.15 In such cases the function of the committee may no longer be routine. For instance, a question of accreditation can arise if, during a civil war, both sides seek to send delegations to United Nations headquarters. This happened in the Congo, and the question overhung for many years the membership of China.[10] Questions of official acceptability have arisen also when international opinion has moved very strongly against a member country, as it did when pressure developed for exclusion of South Africa from the United Nations.[11]

Standing committees

23.16 This title is applied to two committees only, the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and the Committee on Contributions. The former has its origin in the Advisory Group of Experts whose quiet, expert work at the San Francisco Conference subsequently laid the foundation for a rational structure for the United Nations. It examines and reports on the regular and peace-keeping budgets and the accounts of the United Nations and the administrative budget of the Specialized Agencies and advises the General Assembly on other administrative and financial matters referred to it. In the selection of the 16 members of this committee, provision is made not only for broad geographical representation, but also for personal qualifications and experience.

23.17 The second standing committee, the Committee on Contributions, advises the General Assembly on the division of the expenses of the UN among its members, the assessments for new members, appeals by members for a change of assessment, and application of Article 19 in cases of arrears. Its membership stands at 18 and it seeks to avoid entanglement with the politics of arrears. This particular matter is dealt with by Article 19 of the Charter which reads in part:

'A member . . . in arrears in the payment of its financial contributions to the Organisation shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years . . .'

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10 For the sequel see paragraph **23**.34.

11 The United Nations Assembly records are full of examples of the mutual influence of politics, law, institutional theory and practice, etc. A classic instance is the debate on the position of South Africa recorded in A/PV 2281 of 12 November 1974.

23.18 At the time of the Congo crisis of 1960, there was disagreement within the United Nations about paying for the United Nations Emergency Force in the Middle East and for peace-keeping operations in the Congo. The Soviet Union and its Communist associates had taken the line from 1956 onwards that only the Security Council had the authority to establish United Nations forces and decide how their operations should be financed, and the Soviet Union in 1960 opposed peace-keeping activities in the Congo.

23.19 The Assembly failed to resolve the dispute between the two organs and the Soviet Union and, in respect of the Congo, France began to withhold payments. The Assembly in 1961 decided by a majority to refer to the International Court of Justice the question whether peace-keeping activities in the Middle East and the Congo constituted 'expenses of the Organisation' under Article 17 of the Charter.[12] The Court took, by majority vote, the view that no limitation of the scope of United Nations action, as implied by the opposing side, existed in Article 17, thereby rejecting the Soviet and French contention and action. In 1964, when Soviet payments had dropped seriously behind, the United States raised the possibility of action under Article 19 to suspend the Soviet vote in the Assembly. There was naturally relief when crisis was averted by a so-called 'non-objection procedure' which enabled the United States to withdraw its pressure. But this procedural device thinly concealed a major concession of principle proving the non-effectiveness of rules and committees when a leading Power decides not to comply.[13]

Subsidiary and ad hoc bodies

23.20 The remaining committees are grouped by the United Nations under the title Subsidiary and Ad Hoc Bodies. In 2008 there were 31 of them. This total divides itself into four almost equal groups: political and disarmament, individual problems and crises, administration, and the remainder, notably legal, social, and economic. They vary greatly in activity and performance; their scope extends from the 124 members of the Special Committee on Peacekeeping operations, the 63-nation Committee on Disarmament, and the 67 members of the Committee on the Peaceful Uses of Outer Space, through the International Law Commission, to the Joint Inspection Unit which continually inspects the

[12] Article 17.2 reads, 'The expense of the Organisation shall be borne by the Members as apportioned by the General Assembly'.

[13] The discussions, voluntary initiatives, and expedients accompanying this main question were of immense length and complexity and can only be studied completely by reference to United Nations documents. A good background can be obtained from S H Bailey, *The General Assembly of the United Nations* (rev edn, New York, 1964) and S C Xydis in *The United Nations, Past, Present and Future,* ed. James Barros (New York and London, 1972).

functioning of the United Nations machinery.[14] There is one characteristic of almost all of these committees. They are the classic field of modern collective diplomacy conducted by mixed national teams that contain specialist and diplomatic skills, increasingly through individuals knowledgeable in both areas.

23.21 General policy speeches, very often made by foreign ministers and occasionally by heads of government are delivered in plenary session during the first two or three weeks of the regular Assembly session. Since most speakers work out their speeches carefully in advance and devise them at least in part to satisfy audiences at home, there is not much debate at this stage. From then on, practically every item on the agenda is considered in the appropriate committee. This will, if necessary, refer them, generally between sessions, to an existing or ad hoc subcommittee which will be able to do detailed and specialized work in a group smaller than the main committee of anything up to 192 people. Each item will come back from its committee to the Plenary Assembly where it will be voted on, sometimes without discussion and generally with much briefer discussion than that in committee.

23.22 Decisions are taken in committees by a simple majority of those present and voting. The same rule applies in plenary meetings of the Assembly, except in respect of 'important' questions on which decisions are taken by a two-thirds majority of those present and voting. 'Important' questions include automatically recommendations concerning the maintenance of peace and security, elections to the Councils, admission, suspension, and expulsion of members, questions relating to the Trusteeship Council system and budgetary questions: other questions may be ruled to be 'important' by a simple majority vote. The overwhelming majority of substantive decisions are taken in this way. Those wishing to oppose a draft resolution advocate the more difficult hurdle of a two-thirds requirement.[15] Thus a preliminary quasi-procedural vote (or decision by consent) can in fact anticipate the final, formal vote itself.

Order of roll-call voting

23.23 Rule 89 of the Rules of Procedure of the General Assembly reads in part as follows:

> (a) The General Assembly shall normally vote by show of hands or by standing, but any representative may request a roll-call. The roll-call shall be taken in the English

[14] The best way to approach a more detailed knowledge of this subject is undoubtedly to use the latest edition of the *United Nations Yearbook* as a starting-point. Research into the more detailed or more controversial activities can then follow.

[15] The Russians applied to this 'thesis', the term 'hidden veto'.

alphabetical order of the names of the Members, beginning with the Member whose name is drawn by lot by the President . . .[16]

In the early meetings of the General Assembly, the roll-call was conducted in alphabetical order starting at the beginning of the alphabet. This meant that if roll-call votes were declared publicly, the first vote on a difficult question on which voting lines had not yet become clearly defined could have an influence on subsequent voting. Nowadays the General Assembly usually votes by mechanical means which replaces the show of hands or standing. The outcome and each Member State's vote are publicly visible. Any Member State may call for a recorded vote, which replaces a roll call vote, and the result of the mechanical vote is then inserted in the formal record of the meeting.

The Security Council

The Security Council has the primary responsibility for the maintenance of international peace and security. **23.24**

Membership

Originally the Security Council had 11 members, five permanent and six non-permanent. The permanent members were the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The six non-permanent members were to be elected by the General Assembly for two years, a provision in Article 23.2 ensuring that three would be elected each year. Since that time there have been two important changes, one in the number of members and the other in the identity of one of the permanent members. **23.25**

In the election of non-permanent members, due regard is to be paid to the contribution of members to the maintenance of international peace and security and to the other purposes of the organization. Each year, elections to the Council take account of equitable geographical distribution by electing members from each of the geographic groupings, often with agreed candidates nominated by the groups. **23.26**

Procedure

The Security Council is organized so as to be able to function continuously. Every member of the Council has to be represented at all times at the seat of the organization. The position of president is held for a month at a time by each of its members, in the alphabetical order of their English names. **23.27**

[16] *Rules of Procedure of the General Assembly, United Nations* (New York, 1970) 18: Rule 128 prescribes the same procedure for the Main Committees of the Assembly.

Functions

23.28 The main functions of the Security Council are dealt with in Chapters VI and VII of the Charter. Under Chapter VI of the Charter, entitled the 'Pacific Settlement of Disputes', the Council may call on the parties to a dispute to settle it by peaceful means; may investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security; or, at any stage of such a dispute or situation, may recommend procedures or methods of adjustment. Any member of the United Nations or the secretary-general may bring such a dispute or situation to the attention of the Council, or of the General Assembly. Any State not a member of the United Nations may bring to the attention of the same bodies any dispute to which it is a party, if it accepts for the purposes of the dispute the obligations of pacific settlement provided in the Charter.

23.29 Chapter VII of the Charter is entitled 'Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression'. Under it the Council is given extensive powers, including the power to use armed force. Under Article 25 of the Charter, Member States are obliged to comply with decisions of the Security Council (whereas resolutions of the General Assembly can, as a rule, only have the force of recommendations). While up to 1989, owing to the power of veto of the permanent members of the Security Council, the Council rarely exercised the powers granted to it by the provisions of Chapter VII, since that time, the Council has on a number of occasions adopted resolutions which have been mandatory in nature, and involved sanctions and even the use of force. But the Military Staff Committee, for which Article 47 provides and which was intended to assist the Security Council in making plans for the application of armed force, has had from the beginning a purely formal existence.

23.30 While thus vesting primary responsibility for the maintenance of peace in the Security Council, Article 51 of the Charter also provides that nothing contained in it shall impair the inherent right of individual or collective self-defence, if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. A debate continues as to whether this legitimizes action against what is perceived as an imminent threat of attack. It is under this provision of the Charter that the establishment of the North Atlantic Treaty Organization (NATO) was justified (see Chapter **28**).

23.31 The Charter also allows (in Chapter VIII) for the establishment of regional arrangements for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action. But no

enforcement action can be taken under regional arrangements or by regional agencies without the authorization of the Security Council. Both the African Union and the European Union only deploy military forces for peace-keeping operations when the Council has adopted a resolution giving specific authorization.

Enlargement of membership

23.32 With the achievement by a large number of former colonies, particularly in Africa, of national independence, the membership of the United Nations grew to 82 in 1959 (and to 192 by 2008). It became clear that a Security Council of 11 members would not satisfactorily accommodate the views of the various regions of the world on a basis of equitable geographic distribution. It was accordingly decided in 1963 (ratified in 1965) that the membership of the Security Council should be raised to 15, the number of permanent members remaining at five.[17] The geographical distribution of non-permanent seats was laid down as follows:

Africa and Asia	5
Eastern Europe	1
Latin America and Caribbean	2
Western Europe and other States	2

23.33 This change had a consequence which was more than mathematical. When the Security Council numbered 11 members, a procedural motion required seven affirmative votes, so that one such vote had to come from one of the five permanent members. When the membership was raised to 15, it was decided to fix the number of affirmative votes required to carry procedural motions at nine. As a result, such motions can be passed without a vote from any of the permanent members, and even with the support of the five permanent members a resolution also requires the positive votes of four non-permanent members if it is to be approved. To put it differently, any seven of the 10 non-permanent members can collectively exercise a 'sixth veto'. Furthermore, on a matter on which the permanent members are not enthusiastic but on which no permanent member wishes to vote negatively, whether alone or in company with others, a proposition can be carried by the votes of non-permanent members only. This procedure was used in a vote in 1973 in regard to the holding of a Peace Conference in Geneva.[18] Subsequently, and especially in the period 2000–8, debate on a further enlargement of the Council continued, the main focus of discussion being

[17] General Assembly Resolution No 1991(XVIII), 17 December 1963. The Resolution came into force on 31 August 1965 on receipt of the necessary ratifications.

[18] In 1976 Angola was admitted despite abstention by the United States.

an enlargement in the number of permanent members. There was notably strong support for the membership of Japan, India, Brazil, and Germany. Many other States had strong claims to membership. Any new permanent members are unlikely to have a veto but so far there is little prospect of agreement to a package amendment. Since any amendment of the Charter would require the consent of each of the five existing permanent members as well as a two-thirds majority in the General Assembly, the chances of achieving a major change in the near future are not high.

Replacement of the Republic of China by the People's Republic

23.34 At the San Francisco Conference China was represented by the Republic of China. On the initiative of the United States, China was accepted as one of the original sponsors of the San Francisco Conference and one of the permanent members of the Security Council. As a result the the Republic of China (which after the Chinese revolution in 1949 existed only as the Chiang Kai-shek administration in Taiwan) occupied the seat until its replacement by the People's Republic of China on 25 October 1971.[19]

Voting in the Security Council

23.35 Article 27 of the Charter which deals with voting in the Security Council originally read as follows:

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that in decisions under Article VI and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

(The Articles specifically referred to in sub paragraph 3 above concern the Pacific Settlement of Disputes, whether in a general or regional context.)

23.36 Under the amendment to the Charter already mentioned in paragraph 23.32, which entered into force on 31 August 1965, the number of votes required for affirmative decisions was raised from seven to nine.

[19] General Assembly Resolution 2758 (XXVI) of 25 October 1971: 'Restoration of the lawful rights of the People's Republic of China in the United Nations'.

23.37 The effect of Article 27.3 is to create the so-called 'veto', exercisable by any of the permanent members. Not unnaturally this was strongly attacked at the San Francisco Conference by both 'middle' and smaller Powers, but it was a proposition from which the sponsoring Powers and France were not prepared to move, maintaining that it was only by a measure of this kind that the constitution of the United Nations could be made to conform with the realities of world power. The only modification agreed later (1946/7) by the permanent members was that abstention by a permanent member was not to be regarded as the exercise of a veto. Thus, if a permanent member abstained, such an abstention would not imply failure of a draft resolution provided that there were sufficient affirmative votes to make up seven or, after August 1965, nine.

23.38 On 25 June 1950, troops from North Korea crossed the boundary into South Korea and met resistance from South Korean forces. The matter was at once brought to the attention of the Security Council. In the debate the Secretary-General, Mr Trygve Lie, intervened to give his opinion that the attack was a violation of the United Nations Charter. It was to be presumed, however, that any proposal for United Nations preventive action would be vetoed by the Soviet representative.

23.39 But the Soviet Union was at that time boycotting the Security Council and other organs of the United Nations on the ground that, given the victory of the Communist forces on the Chinese mainland the year before, China was no longer properly represented at the United Nations by a Nationalist delegation. Accordingly, when a draft resolution was put to the vote calling for a cease-fire and a withdrawal of forces, there was no veto. Under subsequent resolutions (27 June and 7 July 1950), in addition to the forces of the Korean Republican Army already engaged in hostilities, approval was given for an international force provided by 16 States and organized under what was called a Unified Command, which was under US leadership throughout the war.

23.40 Hostilities were eventually and formally brought to an end by an armistice signed in Korea on 27 July 1953 by the Commander-in-Chief, United Nations Command, the Supreme Commander of the Korean People's Army, and the Commander of the Chinese People's Volunteers. The Armistice agreement provided for the setting up of a Military Armistice Commission, consisting of five members from each side, whose instructions were 'to supervise the implementation of this armistice Agreement and to settle through negotiation any violations of the Armistice Agreement'. Nearly a quarter of a century then passed without change in this military and political arrangement. Because of the absence of the Soviet delegate from the relevant meeting, the Security Council had been able to accept a resolution not only condemning aggression in Korea,

but also calling for action to repel it. The 'Uniting for Peace' resolution, accepted by the General Assembly on 3 November 1950[20] provided principally that, if the Security Council were prevented by lack of unanimity among its permanent members from taking action in a case involving a threat to the peace, breach of the peace or an act of aggression, the Assembly might be called within 24 hours at the request of seven members of the Security Council, or of a majority of Member States, to meet in emergency special session for the purpose of making recommendations for collective measures to maintain or restore peace.

23.41 The 'Uniting for Peace' resolution also provided for a Peace Observation Commission of 14 members which could observe and report on the situation in any area where international tension existed; a Panel of military advisers to be available to advise Member States on the formation of military units which they would be asked to keep ready for service upon the recommendation of the General Assembly or the Security Council; and a Collective Resources Committee of 14 members to study and report to the Security Council and the Assembly on methods of maintaining and strengthening international peace. In fact none of these provisions was ever put into effect. But what had been done was the best that could be achieved in the absence of a Security Council decision and an effective United Nations Military Staff Committee as intended under Article 47 of the Charter.[21]

23.42 No situations involving the procedural complications produced by the Korean crisis arose in the following years. But the proceedings described above enabled a Special Session of the General Assembly to be convoked in November 1956 at the time of the Suez crisis, which authorized the formation of a United Nations Emergency Force to secure and supervise the cessation of hostilities.

Use by the United Nations of armed forces

23.43 It will be useful to trace the sequels of this episode along two lines, the use of military forces by the United Nations, and the use of the veto. It was not unreasonable to expect that, as a result of what happened over Korea, no permanent member of the Security Council would again be absent on a comparable occasion and no further use of armed forces would be made by the United Nations. The first judgement has been correct. The second judgement would be wrong. It is true that with the tacit approval of at least two permanent members of the Security Council, machinery for organizing action under Article 47 of the

[20] Resolution 377, 3 November 1950.

[21] On how the 'Uniting for Peace' procedure has operated in practice, see D Zaum, 'The Security Council, the General Assembly, and War: The Uniting for Peace Resolution', in Lowe, Roberts, Welsh, and Zaum (eds), *The United Nations Security Council and War* (2008) 154–74.

Charter through the Office of the Military Adviser had been allowed to run down. However, this did not happen to the use of the armed forces of the United Nations in the cause of peace-keeping.

23.44 Two years before the Korean War the Security Council had on 29 May 1948 authorized the United Nations mediator in Palestine to use military observers for truce supervision; but at that stage these observers did not constitute an 'interposition' force between possible combatants. Later, after the Suez crisis, a United Nations Emergency Force was placed on the border between Israel and Egypt between the forces of the two countries. In 1967, however, in a tense political situation, the withdrawal of the force was demanded by President Nasser of Egypt and the demand was promptly (and controversially) acceded to by the then United Nations Secretary-General, U Thant. At the end of the subsequent hostilities, the passage five months later of Security Council resolution 242 resulted in the truce supervision organization assuming responsibility for maintaining the cease-fire in the Suez Canal Zone. When in 1973 war broke out again, the Security Council in resolution 338 and 339 of 21 and 23 October set up a new UNEF with the instruction to 'supervise the immediate and complete implementation and observance of the cease-fire . . . and to use its best efforts to prevent a recurrence of the fighting'.

23.45 The use of United Nations forces in a peace-keeping capacity was not confined to the Middle East. In 1960 in the former Belgian Congo (Zaire), the employment of forces in the name of the United Nations was wholly different from the other two referred to above. A few days after independence day (20 June 1960) the Congolese army revolted against the Belgian forces still stationed there and, in the atmosphere of tense fear which followed, the Belgian government ordered the sending of reinforcements from home. The Congolese government appealed to the United Nations for help, and the then Secretary-General, Dag Hammarskjöld, put the matter urgently to the Security Council under Article 99 of the Charter. Putting his initiative in language which was based on the setting up of the UNEF in Sinai and avoiding the concept of 'enforcement,' the secretary-general persuaded the Security Council to accept his plan[22] and at one time there were contingents from 11 members of the United Nations in the Congo for the purpose of promoting the peace and unity of the country. In the wake of the Soviet and French complaints about the Congo operation, a Special Committee on Peace-Keeping Operations was set up by the General Assembly resolution 2006 (XIX) of 18 February 1965 to draw up guidelines on peace-keeping operations.

[22] UN Security Council Resolution 143 (1960) adopted on 14 July 1960.

23.46 Yet another variation in the use of United Nations Forces for peace-keeping was the Security Council's resolution 186 of 4 March 1964, designed to keep the Greek and Turkish protagonists in a near-civil war in Cyprus from actual hostilities. Under this resolution there was established, in consultation with the governments of Cyprus and the three guarantor Powers, Greece, Turkey, and the United Kingdom, a United Nations Force in Cyprus (UNFICYP). Drawn from seven Commonwealth and European countries (including, for the first time, a permanent member of the Security Council, the United Kingdom), the force became operational on 27 March 1964, initially for three months. It remains there in 2009.

23.47 By 2009, peace-keeping and the presence of UN blue helmets or blue berets in conflict areas has become a key UN role and one of the most recognizable aspects of the UN. Conventionally the United Nations only deploys a peacekeeping presence in support of a peace agreement or cease-fire between the protagonists. By the end of 2008 there were 16 UN peace-keeping operations. (There are also some separate non-UN peace-keeping operations, carried out by regional organizations, but with authorization from the UN Security Council, for example the NATO-led force in Kosovo.) In approving a UN peace-keeping operation, the Council resolution spells out its mandate, the protection of the force itself and of civilians in the area of deployment, the use of force permitted, and the size of the force. It is then for the UN Department of Peacekeeping to generate the Force from the offers made by UN Member States. The cost of deployment is a charge on the UN's peace-keeping budget. The nature of resolution adopted has evolved to embrace a comprehensive peace support operation, covering the economic, political, and human rights aspects, as well as taking account of the work of UN agencies and others.

The veto after Korea

23.48 The unique experience of the Korean debate and its sequel did not immediately change the spirit or practice of the Security Council in the use of the veto. In general, the custom was to bring disputes and situations involving possible dangers to peace rapidly before the Security Council (as indeed appeared to be the intention of the Charter) with the resultant risk of veto occurring soon after.[23]

[23] Any serious study of the question owes the highest debt to Sydney D. Bailey, both for his general work on the United Nations, and, in this present context, for his careful, informative and sensitive work *Voting in the Security Council* (1969), and his later work *The Procedure of the Security Council* (1975).

The hundredth Soviet veto was applied in 1963. At the end of that year the total number of vetoes cast since 1945 was as follows: **23.49**

China (Nationalist)	1	
France	4	(2 jointly with the United Kingdom)[24]
USSR	100	
United Kingdom	3	(2 jointly with France)
United States	nil	

Although many of these vetoes had to do with potential new members, it was damaging to the UN organization to face an international crisis and take no decision at all, or worse still, not even to face it, despite the words of the Charter in Article 1.1: **23.50**

> The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace . . .'[25]

A classic example of successful diplomacy to avoid the veto was the handling of the diplomatic situation after the Six-Day Arab–Israel War of 1967. A cease-fire was followed by the calling of a Special Assembly of the United Nations at which the Soviet Union prompted a draft resolution wholly favourable to the Arab view. This was not adopted, and deadlock appeared complete. However, early in August there emerged the first signs that there could be the possibility of compromise. This possibility was pursued over the next three months, particularly by two leaders of delegations in New York, Lord Caradon (United Kingdom) and Arthur Goldberg (United States) and by V V Kuznetsov (Soviet Union), who arrived for the 1967 General Assembly. The end of this intensive 'conference diplomacy' was Security Council resolution 242 of 22 November 1967, which remains an essential element of any proposal for the final settlement of the Arab-Israel conflict.[26] **23.51**

[24] The Anglo-French vetoes concerned the Suez episode of 1956.

[25] There was, for instance, criticism of the failure of the Security Council in 1976 to take active cognisance of the intervention of Cuban troops in the civil war in Angola; and of the civil war in the Lebanon in the same year.

[26] The resolution left behind one ambiguity for which, in the view of the Israelis and some others, a solution is required. The English text of the first 'affirmation' in the resolution contains the following principle: (i) withdrawal of Israel armed forces from territories occupied by the recent conflict . . . The French text (*'des* territoires') does not admit the narrow distinction between 'territories' and 'the territories' implied in the English, and this distinction may require final compromise—and statesmanship. The interpretation of the formula by the majority of delegations was that the text meant a wholesale restoration of occupied territories qualified only by small agreed modifications where experience and good sense indicated that these would help.

23.52 In the later years of the Cold War, from the mid-sixties to the late eighties, there was a notable decrease in the overall number of vetoes used. The US became the principal user of the veto in this period—reflecting the fact that it had become relatively isolated in the Security Council due to the degree of understanding between the Soviet bloc and many of the UN's post-colonial Member States. The numbers of vetoes cast in this period was:

Country	Vetoes cast in 1964–90
China	2
France	13
USSR	15
UK	28
USA	68

23.53 The proportionate increase in Western as opposed to Communist vetoes reflected among other things the careful choice by the Soviet Union of initiatives which, in the view of that government, might secure the support or non-resistance of the non-aligned countries while arousing at least anxiety in the Western world. Since 1990, following the end of the Cold War, the USA has been the most frequent user of the veto, using it on 15 occasions up to the end of 2008. Over the same period, Russia used it 5 times and China 4. Neither France nor the UK has used the veto since 1989. The USA has used it most often to veto resolutions critical of Israel. Indeed the so called Negroponte doctrine is attributed to the US ambassador who is said to have told the Council that the US would oppose any resolution which condemned Israel without also condemning terrorist groups. A particularly controversial use of the veto was China's opposition in 1999 to the renewal of the mandate for a UN peacekeeping operation in the Former Yugoslav Republic of Macedonia because of that country's diplomatic relations with Taiwan. In 2007 and 2008 Russia and China both vetoed resolutions on the situation in Burma/Myanmar and Zimbabwe respectively, on the grounds that they represented an unjustified interference in the domestic affairs of a sovereign State.

23.54 Overall up to the end of 2008 the number of vetoes cast was as follows:

USSR/Russia	119
United States	82
United Kingdom	30
France	18
China	7

23.55 The work of the Council has broadened to cover the changing threats to international peace and security. Article 41 of the Charter empowers the Council to impose measures if it considers this necessary for the maintenance of international

peace and security. Initially this power was little used but by the early 1990s the Council began to turn to this approach. Faced with threats and judging that military action was not appropriate and when diplomatic and political pressures had not succeeded, sanctions of a nature binding on all States were agreed. Early examples were those imposed on Iraq following its invasion of Kuwait, and on Serbia. The nature of sanctions changed in the face of criticism that they were ineffective and penalized the weak and those who were not the intended targets. More sanctions followed, including those against Somalia, Liberia, Cote d'Ivoire, Sudan, North Korea, and Iran. Over time they have become much more focused, targeted more precisely to seize assets, to impose arms embargoes, and to subject named individuals to bans on international travel. Resolutions imposing sanctions are adopted under Chapter VII of the Charter so as to be mandatory and usually set up a sub-committee to oversee the implementation of the sanctions, often assisted by experts. Regional organizations, for example the EU, often act to give effect to UN sanctions, or act in parallel or even separately from the UN.

23.56 As terrorism became a more immediate threat, so the Security Council reacted to it. In 1999 the Council adopted resolution 1267 aimed at imposing assets freezes, travel bans, and arms embargoes against named individuals judged to be connected to Al Qaida and the Taliban. Immediately following the 9/11 attacks in 2001, the Council in resolution 1373 set up the Counter Terrorism Committee and imposed obligations on States to prevent terrorism, to deny safe haven to terrorists, and to cooperate in combating terrorism. States were encouraged as necessary to sign the 12 international anti-terrorism conventions agreed by the General Assembly. In 2004 resolution 1540 addressed the proliferation of weapons of mass destruction and prohibited their transfer to or holding by terrorists. Each of these resolutions set up committees to ensure their implementation. A further resolution 1673 (2005) prohibited incitement to commit terrorist attacks. None of the resolutions sought to define terrorism and more generally, neither in the Security Council nor in the General Assembly has it proved possible to reach agreement on what constitutes terrorism. The search stumbles on the difficulty of covering action by States and acts in resistance to foreign occupation.

23.57 The agenda of the Security Council has evolved to include issues which are less an immediate threat to international peace and security as a longer term or indirect threat. Sometimes termed thematic or horizontal issues, they include consideration of the conflict spectrum including prevention, the role of Special Tribunals, ongoing situations in countries like Sudan and Uganda, and HIV/Aids. A significant resolution was 1325 (2000) which addressed 'Women, Peace and Security' and recognized the role of women as disproportionate victims

of conflict and their contribution to ending conflict and creating stable States. In May 2007 the Council held a debate on the threats posed by climate change, again pushing the boundary of competence.

23.58 A key tension within the United Nations is that between the advocates of Article 2.7 who attach overriding importance to non-intervention in what they consider to be the domestic affairs of a sovereign State and those who want action. This has stopped the Council taking action in response to crises in Burma/Myanmar and Zimbabwe. The issue was addressed in the 2005 World Summit. It set out a doctrine on the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. It held that each individual State had the primary responsibility to protect its citizens. The international community has a responsibility to assist the State, but if the threat persists the international community, through the authority of the UN Security Council, then has the responsibility to act to protect the population from these threats.[27] Because the principle of 'responsibility to protect' as adopted requires Security Council authorization for any military action, it is distinct from those doctrines of 'humanitarian intervention' that claim that individual States, or groupings of States, have a right to intervene in situations of urgent humanitarian necessity. The latter was invoked by a number of NATO Member States in 1999 to justify the military operation in defence of the Kosovars. Although all States at summit level agreed the principle of responsibility to protect, it remains to be seen whether case by case, States are prepared to act and can secure agreement for action in the Security Council.

Economic and Social Council

23.59 Under the heading 'International Economic and Social Cooperation,' Article 55 of the Charter sets out the objectives of this side of the organization's work as follows:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[27] '2005 World Summit Outcome', General Assembly Resolution 60/1 of 16 September 2005.

Authority for carrying out the above functions is vested in the General Assembly and, under its authority, in the Economic and Social Council (Article 60). The Council may make or initiate studies on the matters referred to, and may make recommendation upon them to the General Assembly, to Member States, and to the Specialized Agencies concerned. It may also make arrangements for consultation with non-governmental organizations. The Council enters formal relationships with the Specialized Agencies by negotiating special agreements with each of them, subject to approval by the General Assembly. **23.60**

Membership and procedures

Originally the Economic and Social Council consisted of 18 members, of which one third retired each year but remained eligible for immediate re-election. The number was increased to 27 in 1963 and to 54 in 1971. Decisions of the Council are made by a majority of members present and voting, each member having one vote. **23.61**

Why, given the importance of the economic and social aims of the United Nations and the progress made since 1945 in respect of many of them, does the Economic and Social Council not enjoy a prestige comparable to that of the Security Council? In the United Nations' formative years of 1945–6, while economic and social objectives were realized to be very important, the main interest of governments and peoples lay in organizing the preservation of peace and the prevention of future war: that is why the Charter gave the Security Council strong potential powers. But there was also a basic difference between the two Councils. The Security Council had no competitors—at least not within the UN system; the Economic and Social Council had competition existing already in the International Labour Organization (1919), the International Bank for Reconstruction and Development, and the International Monetary Fund (articles approved in 1946), and later in the World Health Organization (1948) and, on the economic analysis side, the Organisation for Economic Cooperation and Development (1961) and the United Nations Conference on Trade and Development (1964). Of these 'competitors', all but the OECD have since become Specialized Agencies of the UN. Thus, while the Economic and Social Council has initiated such enterprises as the GATT (General Agreement on Tariffs and Trade) now the WTO (see Chapter **25**) and encouraged progress on economic and social developments, including in later years work designed to assist the developing countries, it has never succeeded in establishing for itself a place of world authority. **23.62**

The secretariat

In the opening words of Article 97, 'The Secretariat shall comprise a secretary-general and such staff as the Organisation may require'. **23.63**

The secretary-general

23.64 The same Article continues, 'The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organisation.' Article 98 states that the secretary-general 'Shall act in that capacity in all meetings of the General Assembly' [and of all the Councils of the Organisation] 'and shall perform such other functions as are entrusted to him by these organs'.

23.65 The functions of the secretary-general are up to this point somewhat modestly described. But Article 99 is of a different quality. It reads: 'The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security'. It was realized by those who devised the Charter that one of the difficulties which obstruct international peace-making and peace-keeping is a situation in which national or group sensitivities are so touchy, or moods so tense, that none of the States concerned wish to invoke or provoke third party intervention, national or international. Article 99 contains the strong implication that in such circumstances the secretary-general has some moral obligation to have the position discussed in the Security Council. Such a decision would need both judgement and courage. If the secretary-general acted too hastily, he might make matters worse; if he hesitated too long or did not act at all, he might be failing to exercise on behalf of the organization established as the guardian of the world's security a most important faculty provided explicitly by the Charter. Different secretaries-general have taken different views.

The staff

23.66 The staff of the Secretariat is appointed by the secretary-general under regulations established by the General Assembly. The paramount consideration in their employment and in the determination of their conditions of service is, according to Article 101.3, the '. . . necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible.' In practice, all these conditions have not been fulfilled. Indeed they are hardly self-consistent, since the choice of the most competent candidate cannot be expected regularly to coincide with the widest possible selection on a geographical basis.

23.67 In the performance of their duties the secretary-general and staff may not seek or receive instructions from any government or from any other authority external to the organization. They are to refrain from any action which might reflect on their position as international officials responsible only to the organization. According to Article 100, each member of the United Nations undertakes to respect the exclusive international character and responsibilities of the

secretary-general and his staff and not to seek to influence them in the discharge of their responsibilities.[28] This is an undertaking observed more in the breach than in its implementation.

Languages

23.68 On 1 February 1946, during the first part of its first session, the United Nations General Assembly adopted a resolution entitled 'Rules of Procedure concerning Languages' of which the Annex, paragraph 1, reads as follows: 'In all the organs of the United Nations, other than the International Court of Justice, Chinese, French, English, Russian and Spanish shall be the official languages, and English and French the working languages'. This meant in effect that speeches made in one working language were interpreted into the other, and speeches made in the official languages were interpreted into both working languages. Any representative might make a speech in any other language, but in that case he would be responsible for providing interpretation into one of the working languages; the Secretariat would then provide interpretation from that working language into the other. Apart from this, a fuller documentation would be furnished in the working languages than in any other.

23.69 At that time simultaneous interpretation was in a very early technical stage, but by 15 November 1947, the General Assembly had decided[29] that simultaneous interpretation should be adopted as a permanent service, either as an alternative to, or in connection with, consecutive interpretation. In fact, this was the end of consecutive interpretation in the Assembly.

23.70 Consecutive interpretation has its merit if there are only two languages in use at a Conference, since it gives delegates whose own language is other than either of these two a little more time and opportunity to make sure they understand what has been said. But the eventual increase in the number of working languages made the consecutive procedure impossibly lengthy, and made simultaneous interpretation essential.[30]

23.71 Meanwhile the number of working languages increased. In 1948 Spanish was added. Twenty years later the Assembly decided to add Russian. Five years after

28 Full text in Articles 100 and 101.

29 Resolution 152 (II), 15 November 1947.

30 It is, however, pleasant to record that the end of the era of consecutive system in the United Nations had its glorious moment. The noted Latin-American statesman and orator, Señor Fernando Belaúnde of Peru made at the General Assembly a long political speech in Spanish which was translated into French by one of the famous Kaminker brothers. M. Kaminker reproduced every significant phrase, every telling pause, every emotional tone and even every dramatic gesture, and, having used no notes at all, sat down amid a thunder of applause.

that in 1973, Chinese was included for all purposes, together with Arabic for the Assembly and its Committees. The terms 'official' and 'working' languages were retained in the title of Rule 51, the text of which reads:

> Chinese, English, French, Russian and Spanish shall be both the official and the working languages of the General Assembly, its Committees and the subcommittees. Arabic shall be both an official and a working language of the General Assembly and the main Committees.[31]

23.72 Thus the simultaneous interpretation system, with its six booths containing interpreters, enabled the assimilation of working and official languages to progress, and various national and group claims on behalf of particular languages to be met. A limited addition to the language services was made when, to respond to the needs of Austria and the then two Germanys, it was decided that written German translation services (as opposed to oral interpretation) should be furnished in respect of basic documents, provided that the three countries collectively covered the cost.

23.73 As a result the annual budget provision for the aggregated expenditure of the Translation Division, Interpretation and Meeting Division, and the Editorial and Records Division now amounts to substantial sums.

The Trusteeship Council

23.74 The United Nations Charter devotes three chapters to the subject of dependent territories. Chapters XII and XIII, entitled respectively 'International Trusteeship System' and 'The Trusteeship Council,' deal with a special task inherited from the Permanent Mandates Commission of the League of Nations as modified by the changes in the world military and political situation brought about by the Second World War. Chapter XI, under the title 'Declaration regarding Non-Self-Governing Territories', presents a declaration under which '[m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government . . .'[32] accept certain obligations. The scope and limits of these obligations are discussed in the following section of this chapter. But before the two methods of approach are described separately, it is important to note a degree of common origin.

23.75 Throughout history, stronger States or other groups have for a range of motives occupied through force or threat of the use of force, territories 'belonging to' or administered by others or barely administered at all. From the late sixteenth

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31 Resolution 3189 (XXVIII) and 390 (XXVIII). See also paragraph 7.9.
32 See Article 73, quoted further in Chapter **36**, paragraphs **36**.81–**36**.85.

century onwards, European countries sought first trading posts and later sovereign territory in other parts of the world, notably Asia, Africa, and Central and South America, often in competition with each other.

23.76 At the end of the First World War, strong pressure by the United States, under the leadership of President Woodrow Wilson, led to a change in the world order. Colonies of the defeated Colonial Powers (Germany and Turkey) were placed not under the sovereignty of individual victorious Powers, but under mandate exercised by individual Powers or groups of Powers on behalf of the world community embodied in the League of Nations, and in accordance with obligations laid down in the Covenant of the League. (The failure of the United States itself to become a member of the League did not affect the adoption of the new system.)

23.77 The supervision of the mandated territories on behalf of the League was no doubt lacking in full effectiveness and the supervisors were the victorious Powers. But a new dimension had been brought into being in terms of international law and diplomatic practice. In one part of a judgement on the workings of the mandate system between the world wars, Professor Leland M Goodrich wrote:

> While failing to live up to the expectations of its more idealistic proponents, it did achieve substantial benefits both in the quality of administration of dependent territories and in changing prevailing attitudes and expectations regarding the treatment of dependent peoples.[33]

23.78 It was natural that the drafters of the United Nations Charter should have made provision for the continuation of the Mandate or, under its new name, Trusteeship system. Eleven territories were placed under the Trusteeship Council through agreements approved by the General Assembly. Of these, 10 had become independent by 1975. With the termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands in 1994 and Palau's admission as a member of the UN, the Trusteeship Council had completed the tasks entrusted to it in respect of the last of the 11 territories placed under the Trusteeship system. One territory, South-West Africa (later Namibia), formerly a League mandate administered by South Africa, was not transferred by the administering State to the United Nations Trusteeship system.

23.79 The Trusteeship Council has thus fulfilled its purpose. As a result, the secretary-general in both his report in 1994 on the work of the organization and in his 2005 report 'In larger Freedom' recommended that the General Assembly proceed to eliminate the Trusteeship Council in accordance with Article 108

[33] *The United Nations* (New York, 1959) 296.

of the Charter. The 2005 Summit endorsed this recommendation.[34] The texts of Chapters XII and XIII of the Charter illustrate the development of the idea of Trusteeship, should events again make its adoption expedient and acceptable. Two points may, however, be briefly noted. Article 76(b) of the Charter describes as a 'basic objective' of the trusteeship system:

> To promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.

Thus in careful language, bearing every sign of negotiation and compromise, the Trusteeship system looked forward to independence for those territories which had been committed to Trusteeship.

23.80 Another feature of note was the effort made in Article 86 of the Charter to balance the interests of administering Powers, non-administering Powers, and world security—the latter by the inclusion as members of the Trusteeship Council of all the permanent members of the Security Council. This balance was to be worked out in such a way as '. . . to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not'.[35]

23.81 By the early 1990s the constitution and proceedings of the Trusteeship Council had become irrelevant to the main stream of United Nations policy and action in respect of dependent territories. On 1 October 1994, with the termination of the status of Palau (a small part of the Trust Territory of the Pacific Islands, which had been under Japanese rule before 1945), it completed this task. On 1 November 1994 it suspended its operation. Its abolition (and the deletion of Chapter XIII of the UN Charter) was proposed in the World Summit Outcome document of 15 September 2005 issued by the UN General Assembly. However, no Charter amendment has yet followed from that document.

Non-self-governing territories

23.82 During the Second World War various Allied declarations spoke in terms of freedom, and in the case of India a highly serious, if unsuccessful, effort was made in 1942 to advance this progress beyond the provincial self-government already

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[34] See Articles 79–91 of the Charter.

[35] A comprehensive account is given in S D Bailey, *The Central Assembly of the United Nations* (2nd edn, London and New York, 1964) 176–84; and in the same author's *The Procedure of the Security Council* (1975) 238–40.

achieved. India had in any case been a member of the League of Nations while not yet independent of Britain, and it was accepted internationally that India would be independently represented not only at politico-technical conferences such as the Chicago Civil Aviation Conference in 1944 but also at the San Francisco Conference itself. American opinion, official and unofficial, was strongly opposed to the return of French and Dutch rule in Indo-China and Indonesia respectively, where strong nationalist movements had developed during Japanese occupation. It was thus inevitable that the question whether there should be an Article in the United Nations Charter about non-self-governing territories should be raised and hotly debated in San Francisco. The majority of the Conference, containing as it did Asian, Arab, and Latin-American States, many of which had had colonial pasts, favoured the inclusion of such an article. Against this the proponents of the emerging Article 2.7, the non-intervention clause, could and did argue that the two concepts were inconsistent.[36] When both Article 2 and Chapter XI—the latter dealing with non-self-governing territories—became part of the Charter as ratified, their coexistence raised obvious difficulties. Administering States in due course sought to use Article 2.7 to prevent discussion of items concerning non-self-governing territories, but the Assembly could, if the majority so wished, vote by majority to undertake such discussion.

23.83 The wording of Chapter XI is cautious. It is described as a 'Declaration', and its introductory paragraph, in Article 73, reads as follows:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories . . .

23.84 Article 73(b) opens with a commitment 'to develop self-government' but does not contain a commitment to political independence. On the other hand the phrase 'have not yet attained a full measure of self-government' has an implication of progress towards independence, and a much stronger implication is to be found in Article 1.2 of the Charter which, under the introductory phrase 'The purposes of the United Nations are—' reads in part: '2. To develop friendly relations among nations based on respect for the principle of equal rights and

36 Article 2.7 reads in part: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .' (The remaining language removes this limitation in cases arising under Chapter VII which deals with threats to the peace, etc.)

determination of peoples. . . .'[37] Yet here again interpretation has to be made carefully.

23.85 And, as if in the early stages of the United Nations this matter were not ambiguous enough, reference may be made back to Article 73(e), in which administering Powers accept the obligation to 'transmit regularly to the Secretary-General for information purposes . . . statistical and other information of a technical nature relating to economic, social and educational conditions in territories for which they are respectively responsible'. The equivalent provision in Article 22 of the League of Nations Covenant had been weaker: 'In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge'. Although it is stronger, Chapter XI of the Charter does not provide for the furnishing by the administering Power of political information.[38]

23.86 The limitations in Chapter XI of the Charter are important. But the essential change from previous practice is that the administering Powers accepted the proposition that they had a degree of obligation, sustained by international Charter, to report in detail to the international community on a wide range of matters regarding non-self-governing territories.

23.87 A third consideration, to become later of great importance, was that, no doubt because Chapter XI is a 'declaration', no specific organ of the United Nations was created with power to supervise its operation. The information under Article 73(e) was to be furnished to the secretary-general. But the secretary-general was not told what to do with the information. In the event, he transmitted it to the General Assembly, which created a committee to examine it. This committee, like the Trusteeship Council, was constituted on the basis of parity between administering and non-administering States. The Colonial Powers resisted attempts by the committee or the General Assembly to issue guidance or directives on colonial policy, and also took refuge in the fact that there was no obligation on them to transmit political information on certain territories, on the grounds that these had already attained the 'full measure of self-government' referred to in the Charter. The committee to examine information submitted under Article 73 was dissolved in 1963, as part of the major changes of attitude and pace in the handling of these matters in the early 1960s.

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[37] This Article of course excluded Trusteeship territories for which provision is made in Chapter XII of the Charter.

[38] Professor David A Kay, University of Wisconsin, in his essay 'Colonisation and Decolonisation', in James Barros (ed), *The United Nations, Past, Present and Future* (New York and London, 1972), writes (at 168, n 20) 'significantly for later developments, this provision was sponsored at the San Francisco Conference by the Soviet Union'.

23.88 In the early years after the ratification of the Charter a number of expected developments occurred. India and Pakistan became independent from Britain in 1947 and Ceylon (Sri Lanka) and Burma in 1948: the first three within the Commonwealth and Burma outside. The Dutch, under pressure from the United Nations, accepted similar developments in the Dutch East Indies (Indonesia) in 1950. In 1956, Morocco and Tunisia declared independence from France, and Sudan emerged from a nominal Anglo-Egyptian condominium. In 1957, the Gold Coast (Ghana), under the leadership of Dr Kwame Nkrumah, became the first British African colony to gain independence, and in South-East Asia the same step was taken by Malaya (Malaysia).

23.89 History had now taken charge. Achievement of independence by a number of non-self-governing territories encouraged others to follow suit. The conspicuous failure of the United Kingdom and France, the two leading European Colonial Powers, in their Suez enterprise in 1956; developments towards Algerian independence (1962); the speech by Harold Macmillan, the British prime minister, on 3 February 1960 while on a visit to South Africa, which launched the famous phrase 'the wind of change is blowing through the continent', all pointed this way. There was now no stopping the advance to independence.

23.90 This was briefly the historical and constitutional picture in 1960 when over and above the many new admissions in the 1950s, 17 more colonial countries were due to attain independence and, therefore, to become eligible for membership of the United Nations. The next episode is a classic example of a political tactic applied with appropriate timing to foreign policy and diplomatic situation. On 23 November 1960 the Soviet Delegation requested that an additional item be added to the Assembly agenda, namely, a 'declaration on granting of independence to colonial countries and peoples'.[39]

23.91 The text was considered so important that it was moved by the chairman of the Soviet Council of Ministers (Nikita Khrushchev) himself. Apart from the main theme of the resolution, perhaps the most penetrating phrase of the document as finally adopted was that 'inadequacy of . . . preparedness should never serve as a pretext for delaying independence'.

23.92 There were objections from some delegations to the tone of the language, notably from those Latin-Americans who maintained that there had been some accomplishments in the colonial periods for which credit must be given to the

[39] In the original Soviet draft, the introduction was violent in tone, containing old-fashioned phrases such as: (in the colonial territories) 'the swish of the overseer's lash is heard; there heads fall under the executioner's axe'. (Kay, n 38, 149). The declaration as adopted by the General Assembly was of course less intemperate.

colonizers. The Soviet draft, with minor modifications, was carried by 89 votes to nil with nine abstentions (the administering Powers).[40] By abstaining from voting the administering Powers can be said to have conceded the proposition.

23.93 As explained in paragraph **23**.8, a policy resolution by the General Assembly is not binding; but by a two-thirds majority vote, the Assembly can accept a declaration which would include the establishment of a subordinate body. On 27 November 1961 the Assembly passed a resolution[41] setting up a special Committee on the Situation with regard to the Implementation of the Declaration on Decolonization, to make suggestions and recommendations on the progress and extent of the implementation of the Declaration and to report to the Assembly at the next session. The original committee consisted of 17 members of the United Nations but was increased in 1962 to 24, a figure which caused it to be known as the Committee of Twenty-four. No provision was made for parity between administering and non-administering countries among the first 17 members; seven were from formerly non-self-governing countries in Africa and Asia, and three from Communist countries, if Yugoslavia is included. The procedure included a provision that the Committee would resort to voting procedures 'whenever any member felt that procedure was necessary'.

23.94 The proceedings of the Committee of Twenty-four evolved over subsequent years. There were some difficulties, including the withdrawal of Australia[42] in 1969, and later, in 1971 that of the United States and the United Kingdom. The United Kingdom now has a working relationship with the Committee.

23.95 These events left behind important questions of procedure.[43] One, affecting delegations, especially those on the defensive, was by whom public argument should be conducted. Many of the meetings of the Committee of Twenty-four were conducted in an atmosphere of emotion, sometimes attended with abusive nagging to which officials trained in reasoned argument and moderate language had to reply and develop debating skills.

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40 General Assembly resolution 1514 (XV), 14 December 1960.

41 General Assembly resolution 1654 (XVI), 27 November, 1961.

42 As a minor example, a sub-committee of the main committee visited Aden (South Yemen) in 1967. They correctly called in London on their way and saw the Foreign Secretary, George Brown, who explained the local situation to them. When they reached Aden, the situation was disturbed; the sub-committee stayed in their hotel and refused even to meet members of the local Administration. After a few days they went back to New York and (with the tacit acquiescence of the Secretary-General, U Thant) did not return to Aden.

43 In this connection William Wallace's observations are valuable. See *The Foreign Policy Process in Britain* (London, 1975), especially 261 *et seq*.

The handling of non-self-governing or dependent territory matters was inevitably caught up in East–West rivalries during the Cold War. This eased as more countries became independent. Post 1990, 13 States from the former Soviet empire and six from central Europe became new members of the UN. **23.96**

Postscript

These sections have sought to show how over more than 60 years a number of events and developments have affected the character and practices of the United Nations. Processes which may appear complicated and even frustrating are more readily understood when their origins and history are examined. Undoubtedly, the most important single development has been the increase, which amounts to nearly 300 per cent (50 to 192) in the number of members. Of this latest number, a majority are former dependent territories. **23.97**

Immediately after the drafting and ratification of the Charter in 1945, the hopes of public opinion were perhaps placed too high. Nations did not cease to behave like nations, parties like parties, and politicians like politicians. Successes and failures were mixed. But at least a remarkable degree of universality was achieved for the United Nations. No country wishing to become independent thought in terms of independence outside the United Nations and the only nation so far to suspend its participation (Indonesia) came back. **23.98**

It is natural that the question of the revision of the United Nations Charter should often arise. The rules governing amendments of the Charter are set out in Article 108. They are precise and read as follows: **23.99**

> Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Not unnaturally permanent members of the Security Council do not regard with any enthusiasm a change in their number or identity. National interest and the reality of power play a part in this attitude. But there is also the argument that the Charter as it is at present has not worked too badly and that the search for amendment could weaken the organization. The consequence is that amendments are proving elusive.

The organization will need to respond to the myriad challenges facing the United Nations. These include modernization of the organization, putting in place effective policies to cope with poverty and development, with climate change, with terrorism, and so on, not to mention effective peace-keeping, the **23.100**

peaceful settlement of disputes, and conflict prevention. Members will need to meet their obligations and confront the difficulties. The individual organs of the UN for their part must be prepared to take necessary action within their own competences.

23.101 Diplomats working within the UN system usually belong to a national mission in New York and elsewhere. This entails a specialized role, invariably concentrating on a particular topic or committee, and being the basic source of advice to the ambassador. The range of issues is almost infinite as all challenges, one way or the other, impact on the Organs of the UN or its funds, programmes and agencies. Obviously the diplomat's interest is in the organization and not in the host country. Most of the diplomat's time will be spent with colleagues from other Member States rather than in the mission. Presenting arguments orally and in writing, working and drafting outcomes with representatives of other countries, and concerting results and agreements are crucial skills. A capacity to engage across traditional groupings and blocks is a great asset. Representatives of Member States of the European Union will spend much time concerting EU positions in the General Assembly and its committees, where usually the presidency will speak for all 27 EU Member States.

24

THE UNITED NATIONS—II SPECIALIZED AGENCIES, FUNDS AND PROGRAMMES, REGIONAL COMMISSIONS, AND SPECIAL BODIES

Specialized Agencies	24.1	**United Nations Development Programme (UNDP)**	24.15
UNCTAD	24.10	**United Nations Environment Programme**	24.16
United Nations High Commissioner for Refugees (UNHCR)	24.13	**Human Rights**	24.17
UNICEF	24.14	**Other Programmes and Funds**	24.18

Specialized Agencies

As Aust[1] has noted 'The UN specialized agencies are not part of the United Nations . . . But they all have relationship agreements with the United Nations and are regarded as part of the "UN family"'. On important political matters, such as recognition of statehood, they generally follow the lead given by the United Nations. Agencies such as UNEP, the UNHCR, and UNICEF are not Specialized Agencies, but bodies set up by the UN General Assembly and without separate international legal personality. **24.1**

Article 57 of the United Nations Charter reads as follows: **24.2**

> 1. The various specialised agencies, established by inter-governmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

[1] A Aust, *Handbook of International Law* (Cambridge, 2005).

Article 63, paragraph 1 states that:

> [t]he Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57 . . .

and adds that:

> [s]uch agreements shall be subject to approval by the General Assembly.

24.3 In paragraph 2 of the same Article it is laid down that the Economic and Social Council (ECOSOC) 'may coordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations'. The Council has yet to realize its potential for coordination, particularly in terms of global economic policy where it has little influence on the work of the Bretton Woods Institutions.

24.4 At the time of the signing of the Charter in June 1945, there was in existence only one Specialized Agency of the broad politico-social kind covered by these Articles—the International Labour Organization. Two other important organizations, the International Postal Union, as it then was, and the International Telecommunications Union, soon became Specialized Agencies. Moreover, activity in the direction of creating international agencies to cover Food and Agriculture, Finance, Civil Aviation and Education, Science, and Culture had already reached an advanced stage, and it was clear that this portended an unprecedented growth of intergovernmental cooperation through agencies organized not as periodic conferences, but as bodies with permanent staffs and continuous international work between conference meetings.

24.5 The nature, volume, and authority of such work could not be clearly foreseen; hence the prudent wording of the first sentence of Article 63.2, quoted in paragraph **24.3**. Both the concepts and the constitutions of a number of Specialized Agencies had reached an advanced stage before the United Nations Charter had been approved. By 2007, there were 15 Specialized Agencies, working with the United Nations and with each other through the coordinating mechanism of ECOSOC at the intergovernmental level, and in turn often reporting to the General Assembly. The aim is to deliver at least a measure of compatibility, coherence, and mutual help enhanced by practical coordination through the Chief Executives Board for Coordination at the intersecretariat level. There are also five Specialized Agencies within the World Bank Group. A schedule of Agencies, with brief descriptions of their origins and purposes, appears in Appendix IV.

24.6 The basic structures of such Agencies are generally similar. They consist of an Assembly or Conference of all members to receive reports and determine the

broad orientation of policy, a smaller Executive Board to meet regularly between Assembly meetings to steer and ensure implementation of policy and to prepare Assembly meetings, and a Secretary-General or Director to deliver the work of the agency, approve, and put in place programmes and projects, and manage the overall operation under the control of the Board.

24.7 At the end of 2008, there were 192 Member States of the United Nations, and membership of key agencies tends to be close to that figure, for example both the International Telecommunications Union and the Universal Postal Union have 190 members and the World Health Organization 192. Other more technical agencies may have a slightly smaller membership, for example the World Intellectual Property Organization has 173 members. Each agency has an executive body, usually with a membership of 35–50, chosen with due regard to the equitable distribution of seats among the five world regions of the United Nations (Americas, Western Europe and others, Africa, Asia and Eastern Europe). The degree of political as opposed to technical influence varies with each organization.

24.8 At the time of the establishment of the United Nations, there was a widespread view that it would be natural and useful also to set up United Nations regional organizations to handle economic problems under the auspices of ECOSOC. Their regional nature differentiated them from the Specialized Agencies organized on a world scale; their basis in the United Nations differentiated them from independent regional intergovernmental organizations such as the future Organization of American States or the African Union.

24.9 Each regional economic Commission was set up by ECOSOC and the present list is as follows:

	Established	*Headquarters*
Economic Commission for Europe	28 March 1947[2]	Geneva
Economic and Social Commission for Asia and the Pacific (ESCAP) (formerly the Economic Commission for Asia and the Far East—(ECAFE)	29 March 1947[3]	Bangkok
Economic Commission for Latin America (ECLA)	8 March 1948[4]	Santiago de Chile
Economic Commission for Africa	29 April 1968[5]	Addis Ababa
Economic Commission for Western Asia (ECWA)	9 August 1973[6]	Beirut

[2] ECOSOC resolution 36 (IV) of 28 March 1947.
[3] ECOSOC resolution 37 (14) of 28 March 1947.
[4] ECOSOC resolution 106 (VI) of 28 February and 5 March 1948.
[5] ECOSOC resolution 671 (XXV) of 29 April 1968.
[6] ECOSOC resolution 1818 (LV) of 9 August 1973.

Broadly each is charged with supporting the economic and social development of the Member States in the region and fostering regional economic cooperation and trade.

UNCTAD

24.10 The Bretton Woods Institutions (the International Monetary Fund and the World Bank family) together with the GATT (General Agreement on Tariffs and Trade) were intended as the primary global promoters of economic growth. By the 1960s, the depth of the problems facing developing countries had become clear, and at the call of the General Assembly, the first United Nations Conference on Trade and Development met in Geneva from 23 March to 16 June 1964.[7] By resolution 1995 (XIX) of 1964, the General Assembly established UNCTAD as an organ of the Assembly.

24.11 UNCTAD has subsequently held conferences every four years, the most recent being UNCTAD XII in Accra in 2008. The first item in the official statement of UNCTAD's purposes reads: '(a) To promote international trade, particularly between countries of different stages of development, with a view to accelerating the economic growth of developing countries'.

24.12 As an organ of the Assembly UNCTAD did not appoint a Secretariat after the form of a Specialized Agency, but entrusted to a Trade and Development Board the task of carrying out the functions of the Conference between these formal sessions. The Board meets regularly each autumn for 10 days.

United Nations High Commissioner for Refugees (UNHCR)

24.13 After the First World War, machinery was set up in Geneva, under the auspices of the League of Nations, to deal with the problem of refugees. This organization continued in operation after the Second World War, and the General Assembly decided in December 1950 to appoint a United Nations High Commissioner for Refugees for a three-year term. This appointment has since been renewed at five-yearly intervals. From its beginnings as a non-operational organization, by 2008 a staff of 6,300 was helping 32 million refugees and internally displaced persons in 110 countries. The UN High Commissioner for Refugees also

[7] ECOSOC resolutions 917 (XXXIV) of 3 August, 1962 and 963 (XXXVI) of 18 July 1963, endorsed by General Assembly resolution 1785 (XVII) of 8 December 1962.

monitors the operation of the Geneva Convention and Protocol on the Status of Refugees and issues guidance on its interpretation.

UNICEF

24.14 An allied and, in United Nations terms, older body, the United Nations Children's Emergency Fund was set up as an emergency body in 1946[8] and became a permanent organization in 1953, when it was renamed the United Nations Children's Fund but its acronym remained unchanged.[9] UNICEF work is set out in a medium-term strategic plan, addressing young child survival and development, basic education and equality, and child protection, including combating disease. UNICEF has the special feature of accepting subscriptions from both governments and private organizations as well as from individuals. It is one of the most widely respected members of the UN family working in more than one hundred countries and devoted to improving the quality of children's lives.

United Nations Development Programme (UNDP)

24.15 UNDP began operations in 1966 under General Assembly resolution 2029 (1965)[10] which combined relevant programmes and made it the main body responsible for coordinating UN development work. It has a presence in more than 160 countries, is the largest provider of development grant assistance within the UN system, and seeks to coordinate global and national efforts to reach the Millennium Development Goals, in particular to halve extreme poverty, by the 2015 target. The UNDP representative in a developing country tends to be the resident coordinator for the activities of the UN family in that country. UNDP has co-financing arrangements with donor and recipient governments, as well as with multilateral financing institutions. It has an Executive Board which is responsible for supervising both UNDP and the United Nations Fund for Population Activities. Its Annual Human Development Report focuses on key development issues, providing measurement tools, and often involving controversial policy proposals; for example, the 1992 Report examined progress on the Development Goals country by country.

8 General Assembly resolution 57 (I), 11 December 1946. (The terms of reference were amended in resolution 417 (V), 1 December 1950.)

9 UNICEF/UK Agreement of 7 October 1953 (Cmd 8981).

10 General Assembly resolution 2029 (XX) of 22 November 1965.

United Nations Environment Programme

24.16 UNEP was established by the General Assembly in 1972[11] following the Stockholm Conference on the Human Environment. Based in Nairobi, its mandate includes analysis of the global environment, provision of policy advice on environmental threats, furthering the development of international environmental law and sustainable development, and advancing the implementation of international norms and policies. This is a rapidly evolving area of work. Climate change is now recognized as a major threat to developed and developing countries alike and environmental concerns have much increased importance. It supports the work of the UN Framework Convention on Climate Change which is key to securing global agreement on reducing gaseous emissions. Meanwhile debate continues on how UNEP should evolve institutionally.

Human Rights

24.17 In December 1948, the General Assembly adopted the Universal Declaration on Human Rights. Rights are inherent to all human beings, regardless of any grouping to which they may belong. These rights are indivisible and embrace political, civil, economic, and legal rights. Member States of the UN have a duty and obligation to promote and protect these rights. In 1993, the General Assembly established the post of High Commissioner for Human Rights to promote and protect the enjoyment by all peoples of the comprehensive rights set out in the Declaration. The Commissioner investigates complaints and the more blatant examples of abuse in particular countries. Additionally the General Assembly has adopted numerous conventions on different rights and set up various bodies to safeguard rights. Examples are the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of All Forms of Discrimination, and the Human Rights Committee. Special Rapporteurs are frequently appointed to review implementation of an individual right generically or its abuse, eg the prevention of torture and genocide, or to report on the situation in particular countries. There is now a substantive body of law, exposition of rights, and relevant norms. But the implementation and respect for rights has not matched these provisions and the continued violation of rights in many States remains all too apparent. Frustration at the lack of progress on the ground, and with the then institutional arrangements in Geneva for reviewing human rights,

[11] General Assembly resolution 2997 (XXVII) of 15 December 1972.

led the General Assembly on 15 March 2006[12] to create the Human Rights Council. It is composed of 47 elected Member States and is responsible for strengthening the promotion and protection of human rights around the globe. It includes the new universal periodic review, a mechanism to assess the human rights situation in all 192 Member States on a regular basis. This is a much needed facility as the scrutiny of respect for human rights in individual countries is very desirable. But again concern at infringement of national sovereignty inhibits many Member States from criticizing what are often flagrant abuses in individual countries.

Other Programmes and Funds

24.18 Apart from those summarized above, there are another 10 programmes and funds, as well as research and training institutes and other UN entities. Full details on these and on each of the agencies described above are available on the UN website <http://www.un.org> and in the United Nations Handbook, which is published annually by the New Zealand Ministry of Foreign Affairs.

24.19 It would be remiss not to mention the role of the Office for the Coordination of Humanitarian Affairs (OCHA), part of the United Nations Secretariat, which coordinates the delivery of humanitarian assistance to the victims of disasters and other emergencies. Humanitarian advocacy is also a function. The Office coordinates responses to crises and frequently launches appeals for funding for individual countries in crisis. It operates the Central Emergency Response Fund of the United Nations, using a standing fund to dispense humanitarian assistance immediately as required. Following the Asian Tsunami of 26 December 2004, its role as the coordinator for a global humanitarian crisis came to the fore.

[12] General Assembly resolution 60/251 of 15 March 2006.

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THE G8, G20, WTO, OECD, IMF, AND IBRD

The G8 25.1

The G20 (The Group of 20 Finance Ministers and Central Bank Governors) 25.6

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The G8

25.1 The Group of Eight (G8) is an informal international organization and as such has no permanent headquarters, secretariat, or budget. The G8 comprises seven of the world's leading industrialized nations (US, Japan, Germany, France, UK, Italy, Canada) and Russia. The leaders of these countries meet annually at summits that have increasingly become the focus of often violent protest against the G8's perceived endorsement of and support for globalization.

25.2 The Group's origins go back to the oil crisis and global economic recession of the early 1970s. In 1973, these challenges led the US to form the Library Group—an informal gathering of senior financial officials from the US, Europe, and Japan. At the instigation of Valéry Giscard d'Estaing, the then French president, the 1975 meeting encompassed heads of state or government in what was originally intended to be an informal gathering, 'a fireside chat'. The delegates agreed to meet annually. The presidency of the group rotates annually among the member countries, with each new term beginning on January 1. The country holding the presidency is responsible for planning and hosting a series of ministerial level and expert meetings, leading up to a mid-year summit attended by the heads of government, and for handling the increasingly onerous security arrangements.

25.3 The six nations originally involved became known as the G6, and later the G7 and G8 after the respective entries of Canada (1976) and Russia (1998). Though the G8 was originally conceived as a forum for discussing economic and trade matters, politics intruded, despite French resistance, as early as the late 1970s. The G8 relies for its influence on the economic strength of its members whose agreements carry no legal weight. The workings of the G8 are far removed from the 'fireside chats' of the early 1970s. Security has become a major concern after violent protests in recent years and the leaders now tend to meet in remote or isolated locations. There is still an attempt to keep some of the original informality with advisers excluded from the room, ties and jackets discarded, and an effort to keep the agenda flexible.

25.4 The European Union is represented at the G8 by the president of the European Commission and by the leader of the country that holds the EU presidency if that country is not otherwise a member of the G8 but the EU as such does not take part in G8 political discussions. Critics of the G8 have accused the body of representing the interests of an elite group of industrialized nations, to the detriment of the needs of the wider world. In an effort to reach out to others, important countries with fast-growing economies, notably China, Brazil, India, Mexico, and South Africa, and selected African leaders have been invited to attend special 'outreach' sessions during summits. Sessions with +5 (or G5) leaders have taken place at all Summits since the Evian Summit in 2003, with the exception of the Sea Island Summit in 2004. In recent years, notably at the Gleneagles Summit of 2005, the G8 has launched initiatives on debt relief and disease, including malaria and HIV/Aids. G8 ministerial meetings bring together ministers responsible for issues as wide-ranging as health, law enforcement, labour, economic and social development, energy, environment, foreign affairs, justice and interior, terrorism, and trade.

25.5 In August 2008, there were calls from some politicians in the Western G8 States for Russia to be expelled over its invasion of Georgia and foreign ministers from the other seven members took the unprecedented step of issuing a strongly worded statement criticizing Russian action.

The G20 (The Group of 20 Finance Ministers and Central Bank Governors)

25.6 The G20, which groups finance ministers and central bank governors from 19 of the world's 25 largest national economies, plus the European Union (EU), was set up by the G7 Finance Ministers meeting in 1999 and held its first meeting in Berlin that year. Its aim is to discuss and consult on international financial questions and to promote international prosperity and stability. In November

2008 in response to the dramatically worsening economic circumstances of that period, the G20 met exceptionally at heads of state and government level in Washington DC. It held a further summit meeting in London in April 2009, and marked President Obama's first visit to Europe since assuming office. Collectively, the G20 economies account for about 90 per cent of global GNP and 80 per cent of world trade. The G20 has no permanent secretariat or staff. The country holding the chairmanship in any particular year organizes the meetings and provides secretarial support. The chairmanship rotates annually among the members on a regional basis. Membership, which has remained unchanged since inception, comprises Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States, and the European Union, which is represented by the rotating Council presidency (unless already a G20 member) and the European Central Bank. In addition to these 20 members, the chief executives of the International Monetary Fund and World Bank participate in meetings.

The Organisation for Economic Cooperation and Development or OECD (previously the Organisation for European Economic Cooperation or OEEC)

Origin and purpose

25.7 Action to create European organizations for mutual self-defence grew naturally from the events immediately following the Second World War. The necessity for organizing self-help and mutual and external aid on the European economic front was brought home far more dramatically. The long, bitterly cold winter of 1946–7 exposed with terrible clarity the weaknesses of Europe's economy after six years of war, and the pressing necessity for general cooperation in remedying them.

25.8 The formation for this purpose of the OEEC owes its origin to the historic speech made at Harvard University on 5 June 1947 by the United States Secretary of State, George C Marshall, in which he referred to the need for positive action to help Europe towards economic recovery, but stressed the need for the countries of Europe to reach agreement on the requirements of the situation before the United States could consider how it could aid a joint European programme.

25.9 The speech produced a prompt response from Western Europe. The governments of France and the United Kingdom immediately invited the Soviet government to join with them in considering the American offer of economic aid and preparing a European recovery programme. However, at a meeting between the foreign ministers of the three countries, it soon became evident

that the Soviet government would not cooperate in the active role which the other two governments considered would have to be played by Europe. Accordingly, the French and United Kingdom governments invited all European States (with the temporary exception of Spain) to participate in a Conference for the drawing up of a European programme. The invitation was accepted by the majority of European governments but declined by the governments of Finland and of those countries under Soviet influence.

25.10 The Conference met in Paris in July 1947 and entrusted the work to a Committee of European Economic Cooperation (CEEC). At the end of September the Committee submitted a report covering estimates of production, requirements, and future plans. On the basis of that report, the president of the United States presented to Congress the outline of a European Recovery Programme which was made law by the passage of the European Cooperation Act of 1948. The Act provided for economic aid to Europe during a four-year period ending in 1952, and set up a United States Economic Cooperation administration to administer this aid.

25.11 On the initiative of the governments of France and the United Kingdom a working party was set up in March 1948 to prepare proposals for a new intergovernmental body and to draw up a draft multilateral agreement. On 16 April 1948 a further meeting was held in Paris to sign the Agreement and hold the inaugural meeting of the Organisation for European Economic Cooperation (OEEC). Including Germany (originally represented by Allied Commanders-in-Chief), there were 17 members.

25.12 In 1950, the United States and Canada became associate members of the organization. In practice, all the participants took part in the work of the organization from its inception.

Aims

25.13 The central aim of the organization was expressed in Article 11 of the Convention: 'The aim of the Organisation shall be the achievement of a sound European economy through the economic cooperation of its members.'

General obligations

25.14 Under the Convention member countries assumed certain general obligations. They agreed, for instance, to promote both individually and collectively the development of production through efficient use of their resources (Article 2) and to draw up general programmes for the production and exchange of commodities and services (Article 3). They undertook to achieve as soon as possible a multilateral system of payments, to cooperate in removing restrictions

on payments and trade, and to correct and avoid excessive disequilibrium in their financial and economic relations (Article 4). They agreed to strengthen their economic links, to study customs unions or analogous arrangements, to cooperate in reducing tariff and other barriers for the expansion of trade, to avoid or counter the dangers of inflation, to maintain stability of their currencies and sound exchange rates, and to make the most efficient use of their manpower (Articles 5 and 8). They also undertook to furnish the organization with all the information it required of them (Article 9).

25.15 Rapid and dynamic progress was made and a report was presented annually to the governments, including those of the United States and Canada. Perhaps the most notable feat was the conclusion in 1950 of the European Payments Union. Under this agreement resources made available under the Marshall Plan were used to support European currencies in liberating trade and payments from the tightly controlled bilateral channels in which they had had to operate and developing an increasingly free-flowing multilateral system.

25.16 The European Recovery Programme ended in June 1952, but the United States continued economic aid to Europe. By the end of the 1950s, however, the main purposes of the OEEC had been accomplished. The financial problems of Europe were no longer localized. In terms of industrial supplies, scarcity had been succeeded by plenty and the ordinary channels of trade were operating freely under the rules of the GATT (see below, **25**.19–**25**.22).

25.17 Accordingly, the situation was discussed at a Western summit meeting in Paris in December 1959 (the Federal Republic of Germany, France, the United Kingdom, and the United States). They agreed that the next steps should be:

> (*a*) furthering the development of the less developed countries, and
> (*b*) pursuing trade policies directed to the sound use of economic resources and the maintenance of harmonious international relations . . .
>
> In their view these cooperative principles should also govern the discussions on commercial problems arising from the existence of European economic regional organizations, which are or will be constituted within the framework of the GATT, such as, the European Economic Community and the European Free Trade Area . . .

At a meeting the following April, nominees of the governments of the United States, France, the United Kingdom, and Greece having met as a 'Group of Four on European Organisation'[1] proposed the setting up of a new body to be

[1] They included two diplomats with economic experience, one senior civil servant expert in trade and finance, and the governor of a central bank. For a more detailed account of these proceedings and the thinking behind them see *A Remodelled Economic Organisation,* a Report by the Group of Four (Paris, 1960).

called the 'Organisation for Economic Cooperation and Development'. This new name and the future foreseen for the organization took its work outside the confines of Europe and North America and its main task was to become an authoritative centre of research and initiative in economic thought and development on the economic performance and prospects of the world as a whole. The OECD duly took over from the OEEC in 1961. Since then, in its own words, its mission has been to help its member countries to achieve sustainable economic growth and employment and to raise the standard of living in member countries while maintaining financial stability—all this in order to contribute to the development of the world economy. Its founding Convention also calls on it to assist sound economic expansion in other countries and to contribute to growth in world trade on a multilateral, non-discriminatory basis. In order to contribute to the development of the world economy, the OECD's focus has progressively broadened to include a growing number of other countries, in addition to its 30 members. It now shares its expertise and accumulated experience with more than 70 developing and emerging market economies. For a full list of its current membership and partners see: <http://www.oecd.org>.

The International Energy Agency (IEA)

25.18 The International Energy Agency was established in 1974 in response to the 1973 oil shock. It is separate from but associated with the OECD (membership of OECD is a prerequisite). For most of its history its members have constituted the major consumers of oil, although with the emergence of countries such as China as global economic players this is changing. Members coordinate their policies on oil stocks through the IEA, which has become the leading authority on analysis of global oil markets and is developing its analytical capabilities in other energy markets.

WTO previously GATT

25.19 The World Trade Organization's predecessor, the General Agreement on Tariffs and Trade (GATT), was conceived as an interim agreement with the objective of reducing (and ultimately eliminating) barriers to free trade rather than as an organization. It was established after the Second World War in the wake of other new multilateral institutions dedicated to international economic cooperation—notably the Bretton Woods institutions known as the World Bank and the International Monetary Fund. A comparable international institution for trade, named the International Trade Organization, was successfully negotiated. The ITO was to be a United Nations Specialized Agency and would address not only

trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. But the ITO treaty was not approved by the United States and never came into effect. In the absence of an international organization for trade, the GATT treaty was all that was left.

25.20 The GATT was the only multilateral instrument governing international trade from 1948 until the WTO was established in 1995. Despite attempts in the mid 1950s and 1960s to create some form of institutional mechanism for international trade, the GATT continued to operate for almost half a century as a semi-institutionalized multilateral treaty regime on a provisional basis with a small secretariat in Geneva. Nevertheless it evolved into a de facto international organization and expanded from 23 original signatories to over 120 by the time it was replaced by the WTO in 1995.

25.21 In 1993 the GATT was updated (GATT 1994) to include new obligations upon its signatories. One of the most significant changes was the creation of the World Trade Organization (WTO). Seventy-five existing GATT members and the European Communities became the founding members of the WTO on 1 January 1995. The other 52 GATT members joined the WTO in the following two years. As of July 2008, there were a total of 153 member countries in the WTO. For a current membership list see: <http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm>.

25.22 Whereas the GATT was a set of rules agreed upon by nations, the WTO is an institutional body and while the GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations, and designs (intellectual property), and have a binding dispute settlement mechanism.

The IMF and the World Bank

25.23 The International Monetary Fund was created in July 1944, when representatives of 45 allied governments meeting in the town of Bretton Woods, New Hampshire, in the United States, agreed on a framework for international economic cooperation with the aim of avoiding a repetition of the disastrous economic policies that had contributed to the Great Depression of the 1930s.

25.24 During that decade, attempts by countries to shore up their economies—by limiting imports, devaluing their currencies to compete against each other for export markets, and curtailing their citizens' freedom to buy goods abroad and to hold foreign exchange, the so-called 'beggar my neighbour' policy—proved to

be self-defeating. World trade declined sharply, and employment and living standards plummeted in many countries.

25.25 In their attempt to restore order to international monetary relations, the IMF's founders charged the new institution with overseeing the international monetary system to ensure exchange rate stability and encouraging countries to eliminate exchange restrictions that hindered trade. The IMF came into existence in December 1945, when the first 29 member countries signed its Articles of Agreement. Since then, the IMF has adapted itself as often as necessary to keep up with the expansion of its membership—185 countries as of August 2008—and changes in the world economy. For current membership see: <http://www.imf.org/external/np/sec/memdir/members.htm>. The headquarters of both the IMF and the World Bank are in Washington.

25.26 The IMF's membership rose significantly in the 1960s, when a large number of former colonies joined after gaining their independence, and again in the 1990s, when the IMF welcomed as members the countries of the former Soviet bloc after the dissolution of the USSR. The IMF's role in promoting better economic policies is reflected in the growth of international trade—which has increased from about 8 per cent of world GDP in 1948 to about 25 per cent today—and, until the 2008–9 credit crunch and accompanying financial and economic crises, the smoothing out of boom-and-bust cycles. But the benefits have not flowed equally and while poverty has declined dramatically in many countries it remains a particularly entrenched problem in Africa, partly as a result of long-running wars, debt burdens, and economic mismanagement.

25.27 The World Bank was also established at the Bretton Woods Conference in 1944. Its purpose was to help the war-devastated countries of Europe and Japan to rebuild. By the early 1960s, these countries no longer needed World Bank assistance, and its lending was redirected to the newly independent and emerging nations of Africa, Asia, Latin America, and the Middle East, and, in the 1990s, to the transition countries of Central and Eastern Europe.

25.28 Since its birth in 1944, the World Bank has expanded from a single institution to a closely associated group of five development institutions. It has developed from the International Bank for Reconstruction and Development (IBRD) as facilitator of post-war reconstruction and development to take responsibility for worldwide poverty alleviation in conjunction with its affiliate, the International Development Association.

25.29 While poverty reduction is at the core of the World Bank's work, reconstruction retains an important role, given the natural disasters and post-conflict rehabilitation needs that affect developing and transition economies.

25.30 The IMF and the World Bank complement each other's work. While the IMF's focus is chiefly on macroeconomic and financial sector issues, the World Bank is concerned mainly with longer term development and poverty reduction. Its loans finance infrastructure projects, the reform of particular sectors of the economy, and broader structural reforms.

25.31 Countries must join the IMF to be eligible for World Bank membership. For details of current membership see: <http://www.worldbank.org/>.

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THE EUROPEAN UNION—I DEVELOPMENT, STRUCTURE, AND DECISION-MAKING

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Of all the international and regional arrangements to emerge in the aftermath of the Second World War, the European Union is perhaps the most difficult to classify. More than a classic intergovernmental organization, and less than an embryonic State, the EU's wide-ranging responsibilities and byzantine structures can make it a challenging prospect for diplomats from within the Union as well as for those engaging with its work from other countries. **26.1**

The Origins and Development of the European Union[1]

Post-War Europe and the ECSC

The origins of the European Union lie in the 1951 Treaty of Paris concluded by 'the Six' (Belgium, France, Italy, Luxembourg, the Federal Republic of Germany, **26.2**

[1] On the origins and development of the European Union, see D Dinan, *Europe Recast: A History of the European Union* (Palgrave Macmillan, 2004). For the wider historical and political context, see T Judt, *Postwar: A History of Europe since 1945* (William Heinemann, 2005).

and the Netherlands) which established the European Coal and Steel Community (ECSC). This followed an initiative by the French foreign minister, Robert Schuman, who the previous year had issued a declaration proposing that 'Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe'. This, he urged, would make war between France and Germany 'not merely unthinkable but materially impossible' as well as establishing 'common foundations for economic development'.[2]

26.3 The ECSC was only one of a number of regional arrangements set up in Europe in the years after the Second World War. The Organisation for European Economic Cooperation (OEEC), the precursor of the Organisation for Economic Cooperation and Development (OECD), had already been established in 1948. The following year the Council of Europe was established providing the forum for the elaboration of the European Convention on Human Rights signed in 1950. 1948 also saw the conclusion of the Brussels Treaty whose mutual defence and security cooperation arrangements provided the basis for the Western European Union set up in 1954 (see also Chapters **25** and **28**).

26.4 All these regional arrangements had their roots in the efforts to address the challenges facing post-war Europe—the prevention of future conflict, economic recovery and development, promoting political and social stability, and dealing with the security demands of the Cold War. They also reflected debates across Europe about the nature of the cooperation and integration needed to address these challenges. Most of these new organizations retained an essentially intergovernmental character based on collective decision-making by the constituent Member States. In contrast, the ECSC, while operating within a limited field, was endowed with some *supranational* characteristics. Alongside a Council of Ministers (composed of representatives of Member States) its institutional framework comprised an executive High Authority, a Court of Justice, and a Common Assembly (composed of nominated members of national parliaments).

26.5 This framework itself represented a compromise between those advocating that power should be vested in supranational institutions and those concerned that control should rest with the governments of Member States. The Schuman Declaration had referred to the common foundations for economic development 'as a first step in the federation of Europe' and the debate between those regarding

[2] For text of the Schuman Declaration see <http://www.europa.eu/abc/symbols> or P Stirk and D Weigall (eds), *The Origins and Development of European Integration: A Reader and Commentary* (Pinter: London, 1999).

the regional structures as a stepping stone to deeper political integration and those supporting the maintenance of what de Gaulle advocated as the *Europe des patries*,[3] in which States remain the pre-eminent constituents, has persisted throughout much of the subsequent development of the European Union.

Euratom and the EEC

26.6 Plans for an integrated European military force, the European Defence Community, had been put forward in parallel to those for the ECSC. But following their rejection, the Six, meeting at the Messina Conference in 1955, focused on closer economic cooperation. This led to two further treaties signed in 1957—one establishing the European Atomic Energy Community (Euratom) and the Treaty of Rome establishing the European Economic Community (EEC), subsequently renamed the European Community (EC).[4] These three regional organizations—ECSC, Euratom, and EEC (collectively termed 'the European Communities')—had similar institutional frameworks and supranational characteristics. While they each initially had their own Council of Ministers and Commission (or High Authority in the case of the ECSC), the 1965 Merger Treaty created a single institutional framework under which a single Council of Ministers, Commission, Court, and Assembly served all three Communities.

26.7 Like the ECSC, Euratom was limited in its scope focusing on the 'conditions necessary for the speedy establishment and growth of nuclear industries' and reflecting both the confidence of the period in the potential of atomic energy and concerns about the security of fissile material. Conversely the EEC has proven significantly wider in its scope and provided the main vehicle for the subsequent expansion in the activities of the European Communities.

26.8 Central to the Treaty of Rome was the creation of a European common market—a customs union within which barriers to economic activity between its Member States would be removed. This comprised several key elements: the removal of barriers to the free movement of goods, labour, business, and capital between Member States (the 'four freedoms'); the creation of a common customs tariff (CCT) and common trade or commercial policy (CCP) in relation to third countries; and common rules regulating competition and government subsidies. In addition, separate provision was made for common policies in relation to transport and agriculture. The Common Agricultural Policy (CAP)

[3] See J Touchard, *Le gaullisme 1940-1969* (Paris: Seuil, collection Points, 1978).

[4] The Treaty of Rome, or Treaty Establishing the European Community, is cited in references below as the 'TEC'.

reflected concerns, particularly in France, to protect domestic production, with the financing of agriculture subsidies becoming a particularly significant area of EC expenditure.

26.9 While these areas remain core to the work of the European Communities, the establishment of the European Communities in the 1950s was only the beginning of a continuing process of development marked by a significant increase in membership, important changes to the institutional framework, and expanding areas of activity.

Expanding membership

26.10 In 1973 the membership of the European Communities increased for the first time with the admission of Denmark, Ireland, and the United Kingdom. From the early 1950s, the participation of the United Kingdom in particular had been a focus of political discussion and diplomatic activity. Within the United Kingdom itself this reflected debates about the country's position in the post-war world and ambivalence about the Communities' supranational elements. It is claimed that the British observer at the Messina Conference left with the words: 'Gentlemen, you are trying to negotiate something which you will never be able to negotiate. But if negotiated, it will not be ratified. And if ratified, it will not work.'[5] However by 1961, and again in 1967, the UK had applied to join the Communities. On each occasion this was effectively vetoed by the French President de Gaulle—who was concerned about UK and French differences on the CAP, trade, and relations with the US—and it was only with his departure in 1969 that accession negotiations could be opened.

26.11 The expansion of membership from six to nine States in 1973 was followed by the admission of Greece in 1981; Spain and Portugal (1986); Austria, Finland, and Sweden (1995); Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, Malta, Hungary, Poland, Slovakia, and Slovenia (2004); and Bulgaria and Romania (2007). This expansion has been dictated by various factors: the extent to which existing Member States have been ready to admit new countries, the domestic, political, and economic assessments underlying individual governments' decisions to apply for membership, and—in relation to those admitted in the 1980s and the first decade of the twenty-first century—a desire to support new democracies emerging from military and Communist dictatorship and in so doing to reinforce stability and security in Europe.

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[5] Quoted in P M W Thody, *Europe Since 1945* (Routledge, 2000) 171. The words attributed to the official, Russell Bretherton, are probably apocryphal.

Membership is open to all European States which respect key principles such as democracy and fundamental rights[6] and the process of enlargement is continuing, focusing in particular on the Western Balkan countries. Accession negotiations were also launched with Turkey in 2005 and are expected to extend over several years. Not all expansion has arisen from the accession of new members. In 1990, the territory of the former German Democratic Republic was absorbed into the European Communities as a result of German reunification. Conversely, Greenland, which had previously been covered by Denmark's membership, ceased to be part of the Communities in 1996. **26**.12

Some European States have decided not to join, reflecting in particular domestic concerns about control over national resources and the autonomy of national decision-making. Norway actually completed two accession negotiations in 1972 and 1994 which were both then rejected in referendums. In 1960, a European Free Trade Association (EFTA) was established by States remaining outside the European Communities but subsequent accessions to the Communities have left only four EFTA States—Iceland, Lichtenstein, Norway, and Switzerland. Of these, Iceland, Lichtenstein, and Norway concluded the European Economic Area (EEA) Agreement in 1992 with the European Communities and its Member States creating a single free trade area across their respective territories. **26**.13

The increase in membership from six to 27 States has inevitably changed the character of the organization. It has increased its global significance in terms of population, economic importance, and the diplomatic and military weight of its membership. At the same time resources have had to be committed to absorb less economically developed countries while the increase in national perspectives and interests and sheer number of delegations has placed additional pressures on the decision-making process. **26**.14

Amending Treaties

In parallel to the expansion in membership, the Communities have continuously evolved both in their activities and in their structures and decision-making procedures. This has been reflected above all in a succession of agreements revising the original Treaties which have both reformed the institutional framework and provided for new areas of responsibility. **26**.15

[6] Article 49 of the Treaty on European Union. The 'Copenhagen criteria', laid down by the European Council in Copenhagen in 1993, also set out political and economic criteria for accession such as a functioning market economy.

26.16 The first substantial amending treaty was the Single European Act signed in 1986. This significantly extended majority voting, in particular to facilitate the completion of an internal single market, and made other changes including increasing the powers of the European Parliament, setting out new powers for the EEC in areas such as the environment, research, and economic and social cohesion, and formalizing procedures for cooperation on foreign policy issues (European Political Cooperation). The most significant modifications to the structure of the founding treaties were however made by the next agreement, the Treaty on European Union (TEU—also known as the Maastricht Treaty) signed in 1992.

26.17 The Treaty on European Union followed parallel negotiations between Member States on closer economic and political integration. It introduced into the Treaty of Rome new provisions and institutional arrangements paving the way for Economic and Monetary Union (EMU) and the introduction of the European single currency, the euro, in 1999. It also established, as free-standing chapters in the TEU itself, two new areas of intergovernmental cooperation, distinct from the decision-making procedures of the European Community treaties: the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) covering cooperation on civil and criminal justice matters and immigration (see also paragraph **26**.36 below).

26.18 The TEU made a range of other changes. These included both changes to the institutional framework—creating new bodies such as a Committee of the Regions and again increasing the powers of the European Parliament, notably through the new co-decision procedure—and conferring new powers on the EEC in areas such as social policy, culture, education, development aid, consumer protection, and industry policy. In recognition of the fact that the EEC had clearly expanded beyond its original economic remit, its name was changed simply to the 'European Community'. A new overarching term, 'European Union', was also introduced as a collective name for the European Communities and the intergovernmental areas of CFSP and JHA.

26.19 The changes made by the following treaties—the Amsterdam Treaty, signed in 1997, and the Nice Treaty, signed in 2001—were less ambitious. The Amsterdam Treaty brought into the Treaty of Rome both civil justice and immigration—leaving police and criminal justice cooperation in the intergovernmental area of JHA—and the Schengen arrangements[7] which had developed outside the

[7] The Schengen Agreement (1985) and Convention (1990), were originally concluded and developed by some Member States outside the framework of the European Communities and provided for abolition of internal frontier controls.

EU framework. It also provided for some new EC activities in areas such as energy and tourism, and made some further institutional changes including enhancing the role of the Commission President and reinforcing CFSP decision-making. The Nice Treaty was largely confined to relatively small institutional changes in anticipation of the admission of a significant number of new members from Central and Eastern Europe. It also marked a milestone by winding up the affairs of the ECSC, which had been established for a fixed period of 50 years, and transferring them to the EC.

26.20 These changes fell far short of the reforms which many considered were needed both to ensure the effective operation of a much-expanded European Union and to make the Union more accessible to its citizens and better able to address twenty-first century challenges such as globalization, terrorism, and migration. A 'Convention' of representatives of Member States, national parliaments, and the EU institutions was therefore set up and drew up a draft 'Constitution for Europe', signed in 2004, repealing the existing treaties in their entirety and replacing them with a single text. Following rejection of this Constitutional Treaty in referendums in 2005 in France and the Netherlands many of its innovations were taken up in a new amending treaty, the Treaty of Lisbon, signed in 2007.

26.21 The Lisbon Treaty keeps the existing Treaties but simplifies the existing arrangements by merging the current structures into a single European Union. It brings the remainder of the intergovernmental JHA provisions into the Treaty of Rome, gives legal status to the Charter of Fundamental Rights, a text reaffirming the fundamental rights applicable under Community law, and makes a number of other changes. But its main focus is on institutional reform—including providing for a single individual to exercise external relations functions across the European Communities and CFSP, creating an elected President of the European Council, introducing new voting rules in the Council, and extending the areas of majority voting. However following its rejection in a referendum in Ireland in 2008 its future remains uncertain.[8]

The development of the European Union

26.22 The Lisbon Treaty has been presented as completing, for the present, the process of treaty and institutional change. Certainly after only limited changes to the Communities' framework during the first 30 years of their existence, the period since the Single European Act has seen an ever-accelerating process of treaty change. This has been driven in part by enlargement and the need to reform

[8] At the time of writing, it was proposed to submit the Lisbon Treaty, accompanied by certain 'guarantees', to a further referendum in Ireland.

decision-making to deal with an enlarged Union. It has also been driven by the European Union's internal dynamics as the elaboration and implementation of its policies, and closer cooperation between Member States, have led to work in new areas which are then formally recognized in subsequent treaties. Many apparently new responsibilities conferred by amending treaties—such as the environment, development aid, and cooperation on justice and home affairs—simply reflect activities previously done under existing powers[9] or on the basis of ad hoc cooperation between governments.

26.23 The original core concept of a common market has itself provided a catalyst for the extension of the Communities' activities. While the EC's original remit was clearly economic in character, the creation of a single market in which goods and people can travel freely has brought with it the need both to ensure the removal of all barriers to free movement and to avoid a 'race to the bottom' in which those with the lowest standards gain an economic advantage. This has led to the establishment of Community-wide rules in such diverse areas as manufacturing standards, environmental protection, professional qualifications, and working conditions.

26.24 External factors have also clearly played a key role in the development of the Union. Increased concerns about international migration, transnational crime, and terrorism have been an important catalyst in the rapid development of Justice and Home Affairs. Increasing sensitivity to issues such as protection of the environment, protection of fundamental rights, and combating discrimination have all been reflected in the EU's work. Concerns to ensure greater transparency and democratic accountability have also prompted internal institutional changes and, in part at least, the increase of the European Parliament's powers in each successive treaty.

26.25 The EU's development has equally been influenced by the divergent views of its Member States both on key issues such as balancing free market principles and social and economic protection and on the fundamental question, extending back to the establishment of the ECSC, of the appropriate level of integration and the balance between Member States' powers and those of the EU institutions. The latter has been an explicit, or implicit, issue in every stage of the Union's development and the compromises which it has engendered account for much of the complexity of the EU's structure.

[9] Including what is now Article 308 TEC providing for the adoption of measures 'necessary to attain, in the course of the operation of the common market, one of the objectives of the Community' where the Treaty has not provided the necessary powers.

The Character and Structure of the European Union

The European Union

26.26 The European Union is the overarching term for the arrangements resulting from the Treaty on European Union. The latter describes the European Union as being 'founded on' the European Communities supplemented by the policies set out in the TEU itself.[10] As such the European Union is often described as being based on three pillars.

26.27 The First Pillar comprises the original European Communities each established by its own treaty: the European Community, the European Atomic Energy Community, and the now-defunct European Coal and Steel Community. Each of these Communities is (or was) a separate international organization with its own legal personality and areas of responsibility but sharing the same institutions and similar, albeit not identical, decision-making procedures and legal powers. The European Communities are however far from being typical international organizations and their special character is discussed below. The Second and Third Pillars refer to the separate intergovernmental areas of the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) created by, and set out in, the TEU (see also above at paragraph **26**.17 and below at paragraph **26**.36).

26.28 Unlike the Communities, legal personality was not expressly conferred on the European Union when it was established and there has been considerable debate as to how it is to be characterized and whether it constitutes an international organization. The TEU does provide for international agreements to be concluded with third States and organizations in the areas of CFSP and JHA. On this basis the European Union is now regarded as having the functional capacity necessary to conclude such agreements in its own name and has done so on over a hundred occasions. In doing so however the European Union does not replace the European Communities which continue to exercise their own powers.

26.29 These arrangements were characterized by Commission President Jacques Delors as 'organised schizophrenia'.[11] To simplify the confusing situation, in which third countries and organizations may find themselves having to deal with

[10] Article 1, Treaty on European Union.

[11] 'Delors Calls Latest EC Plan Crippling', *International Herald Tribune*, 21 November 1991. Also quoted in D Buchan, *Europe—The Strange Superpower* (Vermont: Dartmouth, 1993).

both the EU and EC, the Lisbon Treaty[12] would abolish the distinction between the European Union and the European Community. The European Union would be given express legal personality and take over the responsibilities of the European Community which would cease to exist.

The European Community

26.30 While the European Communities may be classified as international organizations the nature of their powers and procedures means that they are usually regarded as *sui generis* entities. Focusing on the European Community—by far the most significant of the two Communities—there are a number of elements which taken together distinguish it from other organizations.

26.31 Under the Treaty of Rome, Member States have conferred on the European Community legal powers or 'competences' to act both within the EC ('internal competence') and in relation to third countries and organizations ('external competence') across a wide range of areas. This includes the power to adopt detailed legislation and legal instruments which can in many cases apply directly as part of the laws of each Member State ('direct effect/applicability') and prevail over any conflicting national laws ('primacy'). Moreover where the Community has acted (or in some cases simply has the power to act), Member States are generally precluded from acting themselves.

26.32 As early as 1963, the European Court of Justice concluded that these characteristics meant that the 'Community constitutes *a new legal order of international law* for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals' (emphasis added).[13] Like other international organizations, it remains open to Member States, as the parties to the Treaty of Rome, to modify the Community's powers or indeed to withdraw from the Community altogether. But subject to these limits, and within its areas of responsibility, the Community exercises extensive powers which closely circumscribe those of its Member States.

The Community method and intergovernmentalism

26.33 The Community's powers are reinforced by the supranational characteristics of its institutions. As discussed below, significant powers are vested in a number

[12] As noted at paragraph **26**.21 above, at the time of writing it remains uncertain whether the Lisbon Treaty will enter into force. This chapter therefore sets out the position under the unamended EU Treaties and notes separately any changes which would be made by the Lisbon Treaty.

[13] Case C26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 at 12.

of institutions—the Commission, European Parliament, and European Court of Justice—which operate independently of the constituent Member States. In addition, the development of the Community has seen a considerable increase in majority voting among States' representatives in the Council reducing their ability to block the adoption of legislation.

26.34 These elements are often referred to collectively as the 'Community (or supranational) method'. They have undoubtedly played a key role in the Community's success in establishing, and enforcing, a common market and other policies which might otherwise have become bogged down in competing national interests and conflicting national laws. However by the same token they represent a significant constraint on the powers of Member States. For this reason many governments have been wary about extending the Community's powers, and the Community method, to new areas of activity.

26.35 This was dramatically demonstrated in the early years of the Communities by the 'empty chair' crisis of 1965. For several months France boycotted the Council of Ministers in a dispute focusing on President de Gaulle's opposition to the introduction of majority voting for agricultural matters. De Gaulle, an outspoken critic of the Communities' arrangements, declared : 'On peut faire des discours sur l'Europe supranationale. Ce n'est pas difficile: il est facile d'être un Jean-foutre.'[14] The dispute was only resolved by a political understanding, the 'Luxembourg Compromise', that a State would not be outvoted where very important national interests were at stake.

26.36 In the negotiations leading to the conclusion of the Maastricht Treaty in 1992, there was particular reluctance to subject the sensitive areas of CFSP and JHA to the Community's powers. For this reason, these areas were kept outside the remit of the European Community and made subject to 'intergovernmental' decision-making. This does not mean traditional government to government diplomacy—decision-making still takes place within an institutional framework laid down by the TEU—but rather maintaining governments' control through the Council of Ministers and curtailing many of the elements of the Community method: a predominance of unanimity voting, a smaller role for the Commission, no joint decision-making with the European Parliament, and the exclusion or limitation of the jurisdiction of the European Court of Justice and with it the application of legal principles and concepts developed in relation to the European Community.

[14] 'One can readily make speeches about a supranational Europe; it's not difficult—it's easy to be a jackass' (author's translation). De Gaulle was speaking at a reception at the Elysée Palace, 10 June 1965. Cited in Touchard, *Le gaullisme 1940–1969*, 218.

26.37 Intergovernmental decision-making continues to apply to CFSP and (following the transfer of civil JHA matters to the European Community) Police and Criminal Judicial Cooperation. Under the Lisbon Treaty criminal justice matters would also become subject to the Community method, while CFSP would still remain a distinct area of intergovernmental decision-making.

Derogations and opt outs

26.38 A further complexity in the EU's structure has arisen from the variations in the ways in which its arrangements apply to different Member States. The general presumption is that the same rules and procedures apply across all States. That is inherent in the notion of creating a common market and common policies. While it was largely possible to maintain this approach in the early years of the Communities, with the increase in membership and the extension of the Communities' (and Union's) activities into new and more sensitive areas, it has been necessary to find ways of accommodating the divergent circumstances of different States.

26.39 States acceding to the EU are frequently given transitional periods during which the application of rules in certain sectors is suspended to allow them time to adjust. States may occasionally secure permanent derogations to address specific areas of sensitivity. Thus, for example, Ireland's constitutional provisions on abortion and Danish national rules on second homes are excluded from the application of the EU Treaties. Special provision may also be needed for a State's particular circumstances—such as the suspension of the application of Community law to northern Cyprus—or for territories having a particular relationship with a Member State—such as the United Kingdom's Crown Dependencies and Sovereign Base Areas (which are outside the European Community but subject to some Community laws) and Gibraltar (which is part of the Community but outside its common customs area).

26.40 However, beginning with the Treaty of European Union's extension into areas of particular sensitivity, it has also been necessary to find ways of accommodating States' divergent views. At the time of the TEU, both Denmark and the United Kingdom secured exemptions from the obligation to adopt the single currency. The United Kingdom also remained outside new provisions on social policy (the 'Social Protocol') although this was later reversed. Under the Amsterdam Treaty, the United Kingdom and Ireland secured a series of special arrangements to protect their national positions in relation to frontier controls, the Schengen arrangements (see n 7 above), and JHA. These include the right to choose whether to opt into civil justice and immigration matters (which would be extended to criminal matters under the Lisbon Treaty). Denmark also secured opt outs in relation to both JHA and defence matters.

The recognition of the need for greater flexibility also led at the time of the Amsterdam Treaty to the introduction of an 'enhanced cooperation' procedure allowing smaller groups of Member States to take forward legislative proposals. While there has been little appetite for using this procedure, debates about 'variable geometry' and a 'two-speed' Europe frequently recur in discussions on the future of the Union. **26.41**

The Legal and Institutional Framework[15]

The Treaties

As outlined above, there are now three key Treaties underlying the European Union: the Treaty establishing the European Community (ie the Treaty of Rome), the Treaty establishing the European Atomic Energy Community, and the Treaty on European Union.[16] All the other treaties providing for institutional changes, new powers, or enlargement have largely operated by amending these founding Treaties. **26.42**

These Treaties are fundamental. They are the basis for the Communities' and Union's powers, they set out their tasks and objectives, and they establish their institutional structures and decision-making procedures. For those working within the European Union, the Treaties are an everyday reference tool relied upon and cited in negotiations and meetings. All activities of the Communities and Union must be grounded, expressly or implicitly, in the Treaties and all legal instruments must cite the Treaty provision ('the legal base') authorizing their adoption. For the European Court of Justice, the Treaties, or 'primary law', are the ultimate source of authority against which legislation and executive action must be judged. **26.43**

While the objectives and policy areas specific to the EU and EC are set out in their respective Treaties, the Union's complex structure means that provisions of **26.44**

[15] On the EU's institutions and decision-making process see Y Devuyst, *The European Union Transformed: Community Method and Institutional Evolution from the Schuman Plan to the Constitution for Europe*, (Brussels: PIE-Peter Lang, 2005); H Wallace and W Wallace (eds), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2000); and M Cini (ed), *European Union Politics* (2nd edn, Oxford: Oxford University Press, 2007). On the EU's legal framework, and EU law generally, see A Dashwood, D Wyatt, *et al*, *European Union Law* (5th edn, Sweet & Maxwell, 2006), and P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (4th edn, Oxford: Oxford University Press, 2007). The European Union portal at <http://www.europa.eu/index_en.htm> provides links to detailed information and documentation on the operation, policies, and structures of the EU institutions.

[16] For the full texts of the Treaties see <http://www.eur lex.europa.eu/en/treaties/index.htm#founding>.

general application are found in both Treaties. Thus most of the provisions on institutional arrangements are in the Treaty of Rome, while general provisions on eg fundamental rights and enlargement are in the Treaty on European Union. Some key provisions, particularly those providing for special arrangements applicable to particular States, are also set out in Protocols which form an integral part of the Treaties themselves.

26.45 Amendment of the Treaties is subject to procedures set out in Article 48 of the Treaty on European Union and in particular requires the convening of an Intergovernmental Conference (IGC) of representatives of Member States who must unanimously agree any changes which are then subject to ratification 'in accordance with national constitutional requirements'. For most States this involves some form of approval or legislation by national parliaments and for some the holding of a referendum. IGCs frequently adopt declarations clarifying or commenting on Treaty provisions which are not binding but might in principle serve as aids to interpretation of the Treaty provisions themselves.

Legislation

26.46 The Treaties give the Communities and Union powers to adopt legislation and other legal instruments across a wide range of policy areas. The negotiation, adoption, and implementation of these instruments is the main focus of much of the work of the EU's institutions as well as being a key vehicle for the delivery of many EU and Community policies. All these legal instruments are binding on those to whom they apply—whether States, companies, or individuals. Save where jurisdiction is excluded (for example in relation to CFSP instruments) they are subject to application and interpretation by the European Court of Justice and, where they take effect in national law, by Member States' own courts.

26.47 The Treaty of Rome provides for three main types of legislation—Regulations, Directives, and Decisions. Regulations and Directives are the principal instruments used to implement policies across all Member States. Regulations automatically apply as part of Member States' national laws. Directives require Member States to implement their provisions through their own legislation (but where States fail to do so may take effect directly in national law). Decisions are used for matters addressed to a particular company or person (for example in relation to a competition or State aid matter). Decisions are also used for internal matters which have legal effect—for example to authorize the opening of the negotiation of an agreement with a third country and subsequently to approve its conclusion.

26.48 Different instruments are used in the intergovernmental areas of CFSP and Police and Criminal Justice Cooperation reflecting their distinct character. Three instruments are commonly used in CFSP: Common Positions (used to set out general

policy positions in relation to a particular region or issue, for example, the adoption of sanctions); Joint Actions (used for operational action such as the launch of crisis management operation); and Decisions for other matters. In the area of Police and Criminal Justice Cooperation, the main instruments are Common Positions (for defining a general approach to an issue); Framework Decisions which require implementation by Member States; and similarly Decisions for other matters. All these instruments are binding on Member States but do not take effect directly in national law.

26.49 These legal acts, together with the treaties and a diverse range of other instruments, principles, and practices established within the framework of the Union, collectively constitute what is termed the *acquis communautaire* which all new Member States must accept on acceding to the Union.

The institutions

26.50 Article 7 of the Treaty of Rome provides for five institutions to carry out the Community's (and where applicable, the Union's) tasks: the European Parliament, the Council of Ministers, the European Commission, the European Court of Justice, and the Court of Auditors. Of these the Parliament, Council, Commission, and Court of Justice are the most significant and are discussed in detail below.

26.51 The Court of Auditors, based in Luxembourg and composed of one member appointed from each Member State, is responsible for auditing of all revenue and expenditure accounts of the Community. In addition, while not classified as institutions, there are a number of other bodies created under the Treaties. The European Central Bank is endowed with extensive powers in relation to the operation of the single currency and would also acquire the status of an institution under the Lisbon Treaty. The Economic and Social Committee, comprising representatives of 'economic and social components of organised civil society', and the Committee of the Regions, comprising representatives of regional and local authorities, are both consultative bodies, have the right to be consulted on some issues, but have no legislative powers.

26.52 Other bodies established by the Treaties include the European Investment Bank and the Ombudsman. An increasing number of separate agencies have also been created by legislation exercising executive functions across a range of important areas such as food safety, medicines, fundamental rights, chemicals, and the environment. By 2009 some 30 such agencies had been established.[17]

[17] For a list of these agencies and their responsibilities see <http://www.europa.eu/agencies/index_en.htm>. See also A Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law' (2008) *EFAR* 515.

The Council of Ministers[18]

26.53 The Council, composed of ministers from each Member State, has a pivotal role in the Union's legislative and decision-making procedures. Its agreement is required for all legislation (except where it has delegated this role to the Commission), CFSP measures, and the conclusion of international agreements. From the time of the ECSC it has represented the governments' counterbalance to the role of the other supranational institutions.

26.54 The Council meets in nine sectoral configurations each composed of ministers with responsibility for that particular area—General Affairs and External Relations (GAERC); Economic and Financial Affairs; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness; Transport, Telecommunications, and Energy; Agriculture and Fisheries; Environment; and Education, Youth, and Culture. Councils meet regularly throughout the year to agree both policy and legal measures, with debate often focusing on the text of Conclusions published after each meeting. Meetings are held in Brussels and Luxembourg (but may exceptionally take place elsewhere, eg for trade negotiations) and may be supplemented by 'informal' Councils hosted by the State holding the Council Presidency.

26.55 Heads of State and Government, and the President of the Commission, also meet at least twice a year (and in practice at least four times a year) in the configuration known as the European Council (not to be confused with the Council of Europe described in Chapter **28** below). This body is charged under the EU Treaty with providing 'the Union with the necessary impetus for its development' and defining 'its general political guidelines'. Its focus is necessarily on high-level issues although under the Lisbon Treaty it would also acquire extra formal decision-making responsibilities and be defined as a separate institution alongside the Council of Ministers.

26.56 All the Councils are chaired by the Member State holding the Presidency. This rotates on a six-monthly basis among all Member States and gives the incumbent a powerful role in setting the agenda of the Council and more generally the Union as a whole. In order to address concerns about the lack of continuity that this creates, the Lisbon Treaty provides for the European Council to elect a President for a period of two and a half years with the Foreign Affairs Council being chaired by the High Representative (see paragraph **26**.59 and Chapter **27** below) and other sectoral Councils still being chaired by rotating Presidencies

[18] See F Hayes-Renshaw and H Wallace, *The Council of Ministers* (Macmillan, 1997).

but organized on the basis of teams of three Member States changing every 18 months.

26.57 The work of the Council is prepared by two Committees (Corepers I and II)[19] composed of Member States' Permanent Representatives, ie ambassadors, to the European Union. The Permanent Representatives themselves, generally appointed from States' foreign ministries, constitute Coreper II which deals with general affairs, external relations, financial matters, and justice and home affairs. The Deputy Permanent Representatives, often appointed from other ministries, meet in Coreper I which deals with the other sectors and in contrast to Coreper II can often be highly technical in its work. Where, as often occurs, agreement is reached on a proposal within either Coreper it is referred to the Council as an 'A' point for formal approval by ministers without debate.

26.58 The work of Coreper is itself prepared by an extensive network of working groups—covering everything from fruit juices to military operations—meeting at varying intervals and staffed by officials coming from capitals or based in the States' missions to the European Union, the Permanent Representations. The latter are themselves composed of officials drawn from across each Member States' ministries with each State's internal arrangements determining both the size of the mission and the degree of autonomy that it is allowed in responding to often fast-moving negotiations. As well as supporting the work of ministers, ambassadors, and officials in the various Council bodies, the Representations also act as the principal conduit for Member States' relations with the Commission, Parliament, and other EU bodies.

26.59 The work of the Council is also supported by a permanent Secretariat whose size and influence have grown with that of the Union—particularly in relation to CFSP where the Council is not only the sole decision-maker but largely responsible for implementation. Under the Amsterdam Treaty, the Secretary-General of the Council was combined with the new role of High Representative for CFSP charged with assisting the Presidency in this field and often taking a prominent representational role. (For the institutional arrangements applicable to CFSP, including the changes which would be introduced by the Lisbon Treaty, see Chapter **27** below.)

26.60 The dynamic of negotiations within the Council is heavily influenced by the relevant voting procedure. While there is always strong pressure to reach consensus, and formal voting is therefore relatively rare, whether or not opponents to a

[19] 'Coreper' is one of the numerous acronyms to be found across the European Union. It comes from the French name for the Committee—Comité des représentants permanents.

proposal can ultimately block it is always an implicit factor in the conduct of discussions. The Treaties stipulate which measures require unanimity and those which are subject to qualified majority voting (qmv). Under the rules as amended by the Nice Treaty (and the Accession Treaty for Bulgaria and Romania) qmv requires: (a) support of a majority (or in some cases two-thirds) of States and (b) 255 votes out of a total of 345 votes allocated to States on the basis of size (the largest having 29, the smallest 3). In addition a Member State may insist that a proposal has the support of States representing at least 62 per cent of the population of the EU. This can make the arithmetic complicated but means, for example, that opposition by three of the largest States (Germany, France, United Kingdom, Italy, Spain) and one medium-sized State or by two large plus four medium-sized States is sufficient to block a proposal. The Lisbon Treaty would overhaul this system introducing 'double-majority voting' simply requiring 55 per cent (or in some cases 72 per cent) of States whose combined populations constitute at least 65 per cent of the population of the Union.

26.61 For simple procedural matters, the Council can act by simple majority. Conversely where it is not acting formally under Treaty procedures, for example in drawing up general political Conclusions, it operates by consensus. In addition, as described at paragraph **26**.35, a political understanding, the 'Luxembourg Compromise', was reached in the 1960s that a State would not be outvoted where very important national interests are at stake.

26.62 Arguably one of the Council's, and EU's, great strengths, and one of the great challenges and opportunities for those working within the Council at all levels, is the absence of fixed voting blocs and coalitions which so often characterize other organizations. States will align themselves differently depending on whether they tend to be more or less integrationist, liberal, or protectionist in their approach to trade; a large or a small State; more or less in favour of social protection and of free markets; a centralized or federal State; a net contributor to or recipient from the EU budget; Atlanticist or Euro-centric in their approach to defence; socially conservative or liberal; and so on. The picture is further complicated by the various opt outs and derogations described above (at paragraphs **26**.38–**26**.41). While some States generally find themselves always in the same (or opposing) camps, coalitions can shift rapidly meaning that ministers and officials may themselves be opposed and allied on different issues in the course of the same meeting.

26.63 Another distinctive feature of Council business is the frequency with which it brings ministers, and in the European Council, heads of state and government, together face-to-face. While much ground-clearing work is done in working groups and Coreper, there are still a wide range of substantive discussions and negotiations—often on technical and detailed issues—which are conducted in

person by ministers, prime ministers, and presidents. Such negotiations can often be prolonged and fatiguing—and tempers can occasionally fray[20]—but they provide a far greater degree of direct contact between government members than is found in traditional diplomatic fora.

The European Commission

26.64 The European Commission is sometimes described as the Union's civil service but its powers are much more extensive. It is the 'guardian of the Treaties' charged with ensuring that Treaty provisions, and measures adopted under the Treaties, are respected. In this capacity it regularly brings infringement[21] actions against Member States. It also has the power to adopt legally binding decisions in key areas such as competition and state aids and has had delegated to it by the Council extensive powers to adopt technical regulations—subject to supervision by committees of Member State experts (a system known as 'comitology').

26.65 In most areas under the Community Treaties, the Commission has the sole right to bring forward proposals for legislation—the so-called 'right of initiative'. While the enactment of such legislation is a matter for the Council and European Parliament, the Commission's control over which proposals are brought forward gives it significant powers in shaping the legislative agenda. This is reinforced both by the Commission's ability to withdraw a proposal once it has been tabled and submit a revised alternative which is more likely to secure approval in the Council and by the requirement that, even in areas where majority voting applies, the Council can only amend Commission proposals by unanimity. In addition, the Commission is represented at all Council meetings, from working group to ministerial level, and thus also has an on-going input into the Council's own deliberations.

26.66 It is only in the intergovernmental areas of CFSP, and to a lesser extent Police and Criminal Judicial Cooperation, that the Commission's role is curtailed. As regards CFSP, the Commission is 'fully associated'[22] with work in this area and has the right to make proposals, but it is Member States, in particular the Presidency, supported by the Council Secretariat who have the principal role in bringing

[20] There were widespread reports of an exchange at the October 2002 European Council between UK Prime Minister Blair and French President Chirac. Blair asked 'How can you defend the common agricultural policy and then claim to be a supporter of aid to Africa? Failing to reform the CAP means being responsible for the starvation of the world's poor.' Chirac responded 'You have been very badly brought up. No one has ever spoken to me like that before.' Quoted in *The Guardian*, 5 April 2002.

[21] Sometimes referred to by the French term 'infractions'.

[22] Article 27 TEU.

forward and implementing proposals. Equally while the Commission has the important responsibility of representing the interests of the Communities in relations with third countries and organizations, this role does not extend to CFSP.

26.67 The Commission, appointed for five years, is composed of nationals from each Member State 'chosen on grounds of their general competence' and whose independence is 'beyond doubt'.[23] The Council initially appoints the President of the Commission by qualified majority and with the agreement of the European Parliament. This appointment is of key importance in setting the direction of the in-coming Commission. The proposed list of the Commission as a whole is then adopted by the Council, again by qualified majority and in agreement with the nominee for President, and submitted for approval by the European Parliament.

26.68 In practice the initial choice of Commissioner from each Member State is largely a matter for the government concerned and appointees are usually experienced national politicians. However the Commission President has an important role in the process—reinforced by his responsibility for allocating portfolios amongst the Commission appointees—and, as outlined below at paragraph **26**.80, the European Parliament can also assert significant influence in relation to both the appointment and dismissal of a Commission.

26.69 Formal decision-making is done by the body of Commissioners as a whole—known as the College of Commissioners—acting by majority. The Treaties stress that Commissioners 'shall neither seek nor take instruction from any government or any other body'[24] and Commission members do not act as representatives of their respective governments. At the same time they can provide an informal conduit both to enable the Commission to understand the perspective and circumstances of a particular government and for a government to appreciate the approach of the Commission. However enlargement has made the size of the Commission unwieldy and proposals under both the Nice and Lisbon Treaties provide for the reduction of the number of Commissioners—although this remains a point of sensitivity for some States and the Lisbon Treaty equally allows this requirement to be reversed.

26.70 In its wider sense, the Commission also refers to the officials—some 23,000 in 2008—responsible for carrying out the institution's functions under the direction of the College of Commissioners. These staff are organized in some

[23] Article 213.1 TEC.
[24] Article 213.2 TEC.

25 Directorates General each responsible for a particular subject area, headed by a Director General and answerable to the Commissioner with the relevant portfolio.[25] In addition there are a series of Services with horizontal responsibilities including the Secretariat General, ensuring overall coordination, and an influential Commission Legal Service.

26.71 The Commission's supranational structure and its range of powers and prerogatives—including in relation to the initiation of legislation and the enforcement of the treaties—have made it emblematic of the Union's distinctive character and a key element in the latter's development. Many would argue that the role of the Commission over the past three decades has decreased relative to both the Council and the European Parliament. Nevertheless it still maintains a central position in the Union's institutional machinery.

The European Parliament[26]

26.72 During the development of the European Union, the role and powers of the European Parliament have changed more significantly than those of any other institution. It also remains the first and only directly elected international body.

26.73 Established as the ECSC's Common Assembly, it was originally composed of representatives nominated by the national parliaments of Member States and had only limited 'supervisory' powers. Its name was subsequently changed to the European Parliament but the critical stage in its development was the first direct election held in 1979. This marked the start of the period in which the Parliament increasingly asserted its role beginning the same year with the use for the first time of its power to block the EC budget. From the Single European Act, which introduced the assent and cooperation procedures giving the European Parliament important new powers, successive amending Treaties have significantly increased both the Parliament's decision-making and legislative powers and the range of issues to which they apply. The European Parliament's principal legislative powers are now exercised through the co-decision procedure, introduced by the Maastricht Treaty.

26.74 As from the 2009 elections, the European Parliament is composed of 736 members allocated among the Member States roughly in relation to population size (ranging from 99 MEPs for Germany to five for Malta) but with proportionately

[25] For a list of the Commission's Directorates General see <http://www.ec.europa.eu/dgs_en.htm>.

[26] See R Corbett, F Jacobs, and M Shackleton (eds), *The European Parliament* (London: John Harper, 2003) and D Judge and D Earnshaw, *The European Parliament* (2nd edn, Palgrave Macmillan, 2008).

greater representation for the smaller States. (These numbers would be amended by the Lisbon Treaty.) MEPs are elected for a period of five years by direct universal suffrage on the basis of proportional representation (using the list system or single transferable vote). Within Parliament they sit by political grouping, rather than Member State, the largest groups including the European People's Party and European Democrats, the Socialists, and the Alliance of Liberals and Democrats for Europe—each grouping comprising MEPs from national political parties sharing broadly similar principles.

26.75 The size of each grouping determines in particular the allocation (by the d'Hondt system)[27] of the influential chairs of the committees. There are 20 Standing Committees covering the full range of the European Union's work including for example the budget, foreign affairs, agriculture, industry, internal market, legal affairs, women's rights, and the environment. The committees—which meet, usually in Brussels, once or twice a month—prepare the work for the European Parliament's plenary sessions, considering and proposing amendments to legislation which has been referred to the Parliament and preparing detailed reports on issues within their remit.

26.76 The relative size of the political groupings also determines the selection of the President of the European Parliament who is elected by absolute majority for a two-and-a-half year period. Amongst other tasks, he or she is responsible for chairing the plenary sessions and addresses the opening session of each European Council. Plenary sessions are held monthly in Strasbourg. The diverse location of the EU institutions, important symbols of reconciliation in the early years of the Communities, has been an increasing focus of debate—above all in relation to the cost created by the split between the Parliament's plenary seat in Strasbourg and its committee work in Brussels.

26.77 It is the plenary sessions which exercise the European Parliament's formal decision-making powers usually by a simple majority of votes cast—or in some cases by a vote of two-thirds or an absolute majority of its component members. There are four main aspects to the Parliament's powers and influence: as a legislator, as a budgetary authority, in exercising oversight of the Commission, and in the adoption of resolutions.

26.78 On some matters, such as the conclusion of some international agreements or the admission of new Member States, the European Parliament has a veto under the assent procedure. Other areas are still subject to the consultation procedure under

[27] The formula devised by the nineteenth century Belgian political scientist Victor d'Hondt to ensure an equitable distribution of posts reflecting the weight of the largest groups while also protecting smaller groups.

which the Parliament has the right to give its opinion but the Council is not bound by its position. However, as noted above, the Parliament's principal legislative powers are now exercised through the co-decision procedure under which it adopts legislation jointly with the Council.[28] The areas which the EC Treaty stipulates are subject to co-decision have steadily increased (and under the Lisbon Treaty it would become the default 'ordinary legislative procedure'). Co-decision entails a three-stage procedure. The Parliament and the Council can seek to agree a legislative proposal, and each others' amendments, at a first or second reading. However if agreement cannot be reached the proposal is referred for intensive (and often late-night) negotiation by a conciliation committee comprised of representatives of the Parliament and Council.

26.79 The budget and oversight of the Commission are the other areas in relation to which the European Parliament enjoys important powers. The Parliament and the Council together constitute the joint budgetary authority with the latter having the last word on 'compulsory expenditure', matters on which the Union is legally obliged to incur expenditure, and the Parliament having the ultimate decision on discretionary or 'non-compulsory expenditure' (see also paragraph **26**.90 below). The Parliament may also for 'important reasons' decide to reject the budget as a whole and ask for a new revised budget to be submitted[29]—a power which it exercised in 1980, 1982, and 1985.

26.80 In relation to the Commission, the European Parliament must approve the nomination of the President of the Commission as well as the appointment of the Commission as a whole; it can also require the Commission to resign by adopting a motion of censure: powers which influenced the resignation of the entire Santer Commission in 1999 and delayed the appointment of the Barroso Commission in 2004. The former in particular was seen as the Parliament's 'coming of age'[30] in asserting its place in the EU's institutional framework. The episode arose from accusations of financial mismanagement and fraud against one Commissioner, Edith Cresson. To avoid a motion of censure, the Commission agreed to the appointment of a committee of experts and resigned en bloc in response to the committee's criticism of the Commission as a whole.[31]

28 The co-decision procedure is set out in Article 251 TEC.

29 Article 272.8.

30 'This entire debate has represented a coming of age, a new maturity in understanding its [the EP's] democratic rights and in its capacity to empower itself to act in the public interest.' Pat Cox, leader of the ELDR and later EP Parliament speaking in the March 1999 debate on the Commission's resignation. Quoted in *The Independent*, 16 January 2002.

31 On this episode, see P Craig,'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation' (2000) 6 *ELJ* (2000) 6.

26.81 Commissioners regularly appear before the European Parliament and the Commission must submit an annual report to, and answer questions from, the Parliament. Council Presidencies have similarly developed the practice of appearing before the Parliament during their term in office reflecting the Parliament's increasing influence.

26.82 The European Parliament regularly adopts resolutions and reports setting out its position across the whole range of issues of interest to the European Union. These are reinforced by the Parliament's authority as the only *directly* elected EU body (although Council members are themselves democratically accountable at the national level).[32] At the same time, there remain many areas under the Community Treaties where the Parliament's decision-making role is limited and its participation in the areas of intergovernmental decision-making is even more restricted. While the European Parliament's role has grown significantly over the past 60 years it still remains in many ways less powerful than either the Council or Commission.

The Court of Justice[33]

26.83 The Court of Justice of the European Communities (known as the European Court of Justice or ECJ) has played a significant role in shaping the character and development of the Communities and, as the final arbiter on the interpretation and application of the Community Treaties, is one of the most powerful elements of the institutional framework.

26.84 Under Article 220 of the Treaty of Rome, the Court's function is to 'ensure that in the interpretation and application of this Treaty the law is observed'. It was set up at the time of the establishment of the ECSC and its workload has continued to grow significantly throughout the development of the Union. To address this, a second court, the Court of First Instance (CFI), was established in 1989 while the Nice Treaty provided for the creation of specialist judicial Panels. On this basis a Civil Service Tribunal, to deal with cases brought by staff of the institutions, was constituted in 2005. The term European Court of Justice is still used to refer to both the three-tier judicial institution as a whole and to what is now the highest court (although the Lisbon Treaty would distinguish the former by referring to the Court of Justice *of the European Union*).[34] Its workload continues

[32] A point which would be explicitly underlined by new provisions introduced by the Lisbon Treaty (as Article 10 of the TEU).

[33] See A Arnull, *The European Union and Its Court of Justice* (2nd edn, Oxford University Press, 2006).

[34] Under the Lisbon Treaty, the Court of First Instance would also be renamed the 'General Court'.

to grow: in 2008 there were 592, 605, and 111 cases before the ECJ, CFI, and Staff Tribunal respectively.[35]

26.85 Both the ECJ and CFI are constituted of one judge per Member State appointed, by the common accord of all Member States, from persons 'whose independence is beyond doubt and who possess the ability required for appointment to the highest (or high) judicial office'. The ECJ itself also comprises eight Advocates General, shared amongst the larger Member States and by rotation amongst the smaller States, whose role it is to prepare opinions to aid the Court's deliberations. In practice each Member State proposes the judges of its own nationality—usually drawn from the judiciary, academia, or public service—who are then endorsed by the other States. The Civil Service Tribunal marked an important change from this practice with only seven judges, appointed by the Council on the basis of recommendations made by an advisory Panel of experts.

26.86 Cases can reach the Courts by two principal routes: by direct actions against the EU institutions and Member States and by preliminary references. Direct actions can be brought challenging the decisions or legislation of EU institutions on various grounds including acting outside their powers, failing to comply with procedural requirements or principles of EC law, and misuse of powers. Such challenges are frequently brought both by Member States, and by EU institutions against each other, and form an important part of the process of defining the parameters of their respective powers. They can also be brought, under strictly defined limits,[36] by companies and individuals who may be particularly affected by a decision or legislative act.

26.87 The Commission frequently brings infringement (or 'infraction') cases against Member States for failure to comply with the Treaties and in particular for failure to implement Community legislation. This has proven to be one of the most important elements in enforcing the common market and Community law generally and was reinforced by the power, introduced by the Maastricht Treaty, to fine Member States which failed to comply with Court judgments.[37] Member States may also launch enforcement actions against each other but this is rarely done. As Community legislation forms part of Member States' own domestic law, national courts also play a key role in its application but can (and sometimes must) refer to the ECJ for definitive interpretative rulings.

[35] See the Courts' annual reports at <http://www.curia.europa.eu>. The Courts' judgments, opinions, and other decisions are also available at this site.

[36] See Article 230.4 TEC.

[37] Article 228 TEC.

These preliminary references make an important contribution in ensuring the uniform application of Community law across all Member States.

26.88 While the Court is based in Luxembourg away from the EU's centres of political and legislative activity, it has played a key role in developing many of the concepts which have been fundamental in the development of the European Union—primacy, direct effect, fundamental rights, exclusive competence for external action, and many of the key principles regulating the common market were all established by Court judgments. Concerns have been expressed by some, and rejected by others, both about an 'activist' court relying extensively on purposive (or teleological) interpretation and about its powerful position as the ultimate judicial authority on matters within its jurisdiction.[38] Sensitivities about the Court's role meant that its jurisdiction has been excluded from CFSP and limited in relation to Justice and Home Affairs—although the limitations in respect of the latter would be phased out under the Lisbon Treaty.

The budget

26.89 Finally, separate mention should be made of the EU's budgetary arrangements which straddle the responsibilities of a number of institutions and can be the focus of some of the most intensive and politically charged negotiations within the Union.

26.90 The budget—some €133.8 billion for 2009[39]—funds expenditure across nearly all areas[40] of the Union's work including agricultural subsidies, funds for less advantaged regions, development aid, and the EU's own running costs. A detailed draft annual budget is prepared by the Commission and submitted for joint agreement by the Council (acting by qmv) and European Parliament in accordance with procedures laid down in the EC Treaty.[41] As noted above, the Council has the ultimate decision on 'compulsory expenditure', which the Union is legally obliged to incur, while the Parliament has the ultimate decision on discretionary or 'non-compulsory expenditure' and may also, in certain circumstances, reject

[38] See, eg, J Weiler, 'The Court of Justice on Trial' (1987) 24 *CMLR* 555; P Neill, 'European Court of Justice: a case study in judicial activism' (1995) European Policy Forum; and T Tridimas, 'The Court of Justice and Judicial Activism' (1996) *ELR* 21. See also the Report of the House of Lords Select Committee on the European Union on 'The Future Role of the European Court of Justice'. 6th Report, 2003–04, HL 47.

[39] This is the 'commitment appropriation', or authorized expenditure, for 2009. 'General Budget of the European Union 2009: The Figures', European Commission, Office for Official Publications of the European Communities, Luxembourg 2009. See also detailed budget at <http://www.eur-lex.europa.eu/budget/www/index-en.htm> and more generally <http://www.ec.europa.eu/budget>.

[40] Separate financing arrangements have been established in a very few cases, notably the European Development Fund for funding cooperation with African, Caribbean, and Pacific countries.

[41] See Articles 268–80 TEC.

the budget as a whole. With very limited exceptions, expenditure can only be incurred by the Union where provision has been made in the budget and the frequent disagreements over the budget usually reflect broader differences between the institutions regarding the EU's work and the priorities.

26.91 The EC Treaty stipulates that expenditure must be balanced by revenue in each budgetary year.[42] Revenue originally came from Member States' direct contributions but was later replaced by financing from the Communities' 'own resources'. These are determined by a Council decision[43] and currently comprise revenue from agricultural levies and customs duties, a fixed percentage of Member States' national revenue from value-added tax, and contributions from each Member State based on their own gross national income.

26.92 The Decision on Own Resources is now re-negotiated every seven years as part of a wider package of measures, 'the financial perspective', intended to allow longer term planning of expenditure in line with the Union's revenue. These perspectives are enshrined in an 'inter-institutional agreement' between the Council, Commission, and European Parliament which places annual ceilings on various general categories of expenditure. While this has helped facilitate agreement on the annual budgets it also means that the periodic negotiation of the financial perspective is one of the most significant exercises undertaken within the Union—for Member States and the institutions alike.

26.93 The negotiation of Member States' financial contributions can prove particularly contentious given not only divergent views about how much the Union should itself do (and thus spend) but the often important differences in the extent to which States contribute to and benefit from the EU budget. The United Kingdom's concerns about what it regarded as significant imbalances in its budget contributions and distortions in EU expenditure led to one of the most difficult negotiations within the EU with UK Prime Minister Margaret Thatcher finally securing a budget abatement (the 'rebate') in 1984. The British Permanent Representative during this episode concluded: 'You can only get your way in the Community by sustained will-power, careful planning and skilled negotiation; . . . if you have these things and a good case, the Community has in the end to take account of it'.[44]

[42] Article 268 TEC.

[43] For the Own Resources Decision in force from 2007 see Council Decision 2007/436/EC, Euratom published in the *Official Journal* at OJ L163/17, 23/06/2007.

[44] M Butler, *Europe: More than a Continent* (London: Heinemann, 1988).

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27

THE EUROPEAN UNION—II EXTERNAL RELATIONS

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Most of this book describes the diplomatic practice of States in conducting their relations with other States either bilaterally or within a multilateral framework. The independent conduct of foreign relations—through diplomacy among other means—is a key element of becoming, and being accepted as an independent sovereign State. To a limited extent, however, international organizations may also be actors in the field and may carry out some of the functions which flow from acceptance as a sovereign State—making formal statements and representations on international matters affecting their areas of competence, concluding treaties and international agreements, becoming observers at and (in a very few cases) members of other international organizations, making international claims, and accepting international responsibility for their own actions. The European Community and now the European Union have over the last 50 years gradually acquired wider powers to act in these ways than any other international organization. Their powers however are not those of a sovereign State. The areas where they may act and the methods through which they conduct international relations are limited by the powers conferred on them by successive treaties, and also by the determination on the part of Member States of the European Union that the Union should not encroach into their own sovereign independence or itself evolve into a form of federal State—a 'United States of Europe'. **27.1**

Historical Development of European Community External Powers

27.2 The Treaty of Rome which in 1957 established the European Economic Community (EEC) of six Member States gave the new organization legal personality (later held to imply international legal personality as well as legal personality within the legal systems of the Member States) and express powers to conclude international agreements falling within the common commercial policy. This was a logical corollary of the intention to establish a customs union among the Member States with no customs duties imposed on movement of goods across internal borders and a common external customs tariff to be levied on goods entering the common customs area. If Member States had remained free to conclude individual commercial agreements with non-member States on tariffs and quotas this would have undermined the concept of a uniform régime under which goods from outside the Community could enter at any port in any Member State and then circulate freely within the common market. The EEC Treaty provided that the European Commission would negotiate international commercial agreements on behalf of the Community under negotiating directives (known as mandates) drawn up by the Council of Ministers, and the Council would then approve and conclude the agreements. If any question was raised as to compatibility of a proposed agreement with Community rules, the matter could be decided on application to the European Court of Justice before the agreement entered into force. These powers and procedures gave the Commission a powerful role in the conduct of the Community's commercial relations with the rest of the world and many agreements were drawn up on trade matters, tariffs, quotas, rules for exports, and imports between the EEC and non-member States. These agreements were binding both on the EEC and on the Member States and some of their provisions—if they were clear and unconditional—could be enforced in national courts by individuals for whose benefit they had been drawn up.

27.3 The EEC was also given under its original Treaty an express general power to conclude with a non-member State or an international organization 'agreements establishing an association involving reciprocal rights and obligations, common action and special procedures'. This power to conclude 'association agreements' was at first aimed at agreements with States which had before independence been dependent territories of one of the Member States and were therefore thought to be entitled to protective or preferential treatment, since their traditional exports to their mother country would otherwise have been severely disrupted by the new common external tariff. Later, association agreements came to be used more

extensively and in particular for arrangements with States such as Greece and Turkey which aspired to become candidates for membership of the Community. These agreements covered a much wider area than trade and commerce—including, for example, provisions for financial and technical assistance and for cooperation in a wide range of issues. Under this power there have been concluded successive Conventions with countries in Africa, the Caribbean, and the Pacific (the ACP) which in exchange for trade preferences and financial support now require acceptance of Community standards in such matters as competitive tendering, democracy, and human rights.[1]

27.4 The EEC Treaty further provided for the Community to establish relations with the United Nations and its Specialized Agencies, with the Council of Europe, and with the Organisation for European Economic Cooperation (later the Organisation for Economic Cooperation and Development) and the Community became an observer in all of these bodies (and also in other international organizations whose activities lay within its own areas of competence). In the United Nations General Assembly the Community was entitled to speak in debates but not to vote.[2] The Commission argued that it had the right to speak at international conferences and meetings on matters within its competence, but practice on this was not consistent in all organizations. The Community however also had power under its Treaty to establish appropriate relations with the organs of the General Agreement on Tariffs and Trade (GATT) and although the terms of the GATT of 1948 did not permit the Community to become a member, it came in practice to be treated as if it were and the European Commission under its exclusive powers under the EEC Treaty acted as spokesman and negotiator for the Community as a whole (though of course it was authorized and ultimately controlled by the Council of Ministers in Brussels). The Commission by practice presented positions in international fora on behalf of the Community on legal matters, brought claims, and intervened for this purpose in legal proceedings in national as well as international courts.

27.5 As the EEC drew up more and more internal legislation—some of it in areas such as the environment for which there was at the outset no express provision—it came to be accepted that these internal rules implied a competence for the Community to negotiate and conclude external agreements which might affect them, since otherwise the effectiveness and coherence of the internal legal order would be put at risk. The principle of implied external treaty-making powers—known as the AETR (or in English ERTA) principle from the case in which it was

[1] Succeeding the Conventions signed in Yaoundé and in Lomé, currently in force is the 2000 Cotonou Partnership Agreement, OJ 2000 L317/3, amended in 2005.

[2] GA resolution 3208 (XXIX) of 11 October 1974.

first confirmed and described by the European Court of Justice[3]—gradually widened the areas in which the Community had the sole and exclusive power (that is, excluding the Member States from concurrent power) to negotiate and conclude external agreements. It is however a complex principle, and the areas covered constantly expand as the Community adopts new internal rules which give rise to parallel external powers for it to negotiate and conclude treaties. Implied powers give rise to numerous arguments and to European Court litigation within the Community and it is even more difficult for countries outside who seek only to know with whom they should negotiate or to whom they should complain about a breach of treaty obligations. Successive revisions of the Treaties have transformed a number of these implied powers—for example on the environment and development—into express external powers which has assisted clarity. But the AETR principle—with all its difficulties and ambiguities—remains of central importance to external action by the Community.[4] This was clearly shown in 2002 when the European Court on the basis of the AETR principle held in a number of joined cases that the Member States were in breach of Community law by maintaining in force and re-negotiating bilateral air services agreements with countries all over the world which contained provisions which 'affected' Community rules on freedom of establishment as well as rules on detailed aspects of aviation.[5] Member States, many of whom wanted to preserve their capacity to conclude third country agreements, had in the course of building an internal market in air services agreed Community directives which established internal Community provisions on fares and access to routes.

27.6 It can be seen that the Community was given no general power to conduct external or foreign relations. It was increasingly regarded as anomalous that the Community had great difficulty in formulating a coherent approach to situations which straddled commercial and political aspects. There had been since 1970 a system known then as European Political Cooperation (EPC) under which foreign ministers of the Member States and their senior diplomats consulted and built consensus where unanimity existed on political matters of common concern such as the Middle East conflict or the negotiations with the Communist bloc in the framework of the Conference on Security and Cooperation in Europe

[3] Case 22/70, *Commission v Council* [1970] ECR 263. The dispute concerned whether the Commission on behalf of the Community, or the Member States should conduct negotiations for a new European Road Transport Agreement (ERTA) after the Community had adopted internal rules harmonizing social matters such as drivers' hours.

[4] See D McGoldrick, *International Relations Law of the European Union* (1997) esp. ch 3, EC competence in international relations, for a clear account of the early evolution of EC external powers; P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford: Oxford University Press, 2004) chs 3 and 4.

[5] Case C-476/98, *Commission v Germany (Open Skies)* [2002] ECR I-9855 and linked cases.

(CSCE). EPC was kept firmly out of the sphere of intra-Community relations and outside the Community legal order and was 'conducted by diplomatists for diplomatists, employing informal and highly flexible procedures'.[6] But in reality international relations could not thus be clearly partitioned—as Lord Carrington said in 1981 when speaking as British Foreign Secretary in New York: 'Over the years the realisation has grown that economic policy and foreign policy are Siamese twins'.[7]

27.7 Two examples of the difficulties at this period may be given. The prolonged negotiations for the 1982 Law of the Sea Convention straddled areas such as conservation of marine resources where the Community had competence and other areas (such as demarcation of territorial waters and piracy) remaining within the competence of Member States, so that this would be for the Community a 'mixed agreement' which the Community would be entitled to sign along with the Member States. Other States at the Conference however not unreasonably sought precision as to where the Community had competence and made it a condition of permitting the Community to become a Contracting Party to the Convention that they should be provided with a Declaration setting out the exact position. The Community had to accept this requirement—but formulating the text of the Declaration involved applying the AETR principle (described above) to long lists of legislation on, for example, environmental protection and marine pollution, was controversial among Member States, and the Declaration was soon out-of-date as further legislation was adopted.[8] It was also of limited assistance to non-member States as it did not indicate clearly the implications of the list on power to conclude the Convention or responsibility for giving effect to its provisions. The imposition of punitive sanctions for political reasons was another matter where the Community had limited (and hotly disputed) competence. So when in 1980 Community foreign ministers sought to impose economic sanctions on Iran in response to its complicity in the detention by militant students of United States hostages in the US embassy in Tehran—widely perceived as a flagrant breach of the most fundamental rules of diplomatic law—it was necessary for all nine Member States of the then Community each to legislate at national level. Lord Carrington as Foreign Secretary agreed at a meeting in

6 S J Nuttall, 'European Political Cooperation and the Single European Act' (1985) *YEL* 203.

7 (1980) 57 *International Affairs* 1 at 3.

8 Annex IX to the UN Convention on the Law of the Sea, Cmnd 8941, permits participation by international organizations to which Member States 'have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters'. Article 5 of Annex IX requires the accession instrument of an international organization to contain a declaration specifying these matters. The Member States of the organization are presumed to have competence over all other matters. Changes to the distribution of competence must be notified to the depositary.

Naples with his European ministerial colleagues that sanctions would be imposed retroactively to the date of the seizure of the US embassy, but the UK House of Commons refused to authorize this retroactivity (which would have damaged British commercial firms with existing supply contracts) so that sanctions were ultimately not imposed throughout the Community on a uniform basis.[9]

Establishment of the European Union and the Three-pillar Structure

27.8 The Single European Act, drawn up in 1986 to amend the European Community Treaties, for the first time placed the informal structures of European Political Cooperation on a treaty basis. The commitments were only 'soft law'—that is purely procedural in nature—and the Community institutions were almost entirely excluded. It was the High Contracting Parties (the Member States) who had to 'endeavour jointly to formulate and implement a European foreign policy'. A distinction emerged between 'external policies'—governed by the Community rules and procedures outlined above—and 'foreign policies' to be formulated by national foreign ministers on an intergovernmental basis and creating obligations under public international law. There was no jurisdiction for the European Court of Justice over EPC. The habits of consultation and cooperation on foreign policy issues continued to intensify among foreign ministers, officials, and diplomats. Common positions began to be implemented in diplomatic démarches, coordinated action in international conferences and on sensitive matters such as recognition of newly emerged States, and the sending of observer missions into difficult situations such as South Africa during the approach to the first multi-racial elections in the early 1990s.

27.9 The Treaty on European Union (TEU) signed at Maastricht in February 1992—entering into force on 1 November 1993—established the European Union under a 'three-pillar structure' which despite sustained attempts to demolish and replace it remains in force 15 years later. Under the TEU

> The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.

[9] S J Nuttall, 'Interaction between European Political Cooperation and the European Community' (1985) *YEL* 211; E Denza, *The Intergovernmental Pillars of the European Union* (2002) 41.

The central pillar of the Union was formed by the Communities (the European Atomic Energy Agency (Euratom) and the European Coal and Steel Community (ECSC) as well as the European Economic Community, now the European Community). These three international organizations (now two since the ECSC lapsed) are described in Chapter **26**, paragraph **26**.6 above. The 'supplementary forms of cooperation' are intergovernmental and generally more political in character. The obligations which may be created under their procedures are legally binding under public international law only and not capable of being enforced by individuals before national courts. The Second Pillar is the Common Foreign and Security Policy (CFSP) and the third was originally Cooperation in Justice and Home Affairs—now titled Police and Judicial Cooperation in Criminal Matters—also described in Chapter **26**. There are certain over-arching provisions which set out Union objectives common to all three pillars. The Union is required to ensure consistency in its external activities—and the Council and European Commission are charged with this responsibility.[10] In practice this has not proved straightforward because of institutional and personal differences, as well as genuine difficulties in fitting policy objectives neatly into the different pillars.

27.10 Under the Second Pillar the newly established CFSP was given specific objectives which include safeguarding the common values, fundamental interests, and independence of the Union, preserving peace and strengthening international security, promoting democracy, the rule of law, and respect for human rights. The Council of Ministers of the European Union ('the Council') was given powers to adopt instruments—common positions and joint actions—binding on the Member States under international law.[11] The CFSP would include all questions relating to the security of the Union including the eventual framing of a common defence policy. The European Council—which consists of the heads of state or of government of all the Member States—was given the supervisory role of defining principles and guidelines for the CFSP. Obligations were placed on the Member States. They were required to support the Union's external and security policy actively, to refrain from any action which is contrary to the interests of the Union, and to inform and consult one another within the Council on any matter of foreign and security policy of general interest. Diplomatic and consular missions of the Member States were required to cooperate in

[10] For a full account of the distinctions between the Community and the intergovernmental methods see E Denza, *The Intergovernmental Pillars of the European Union* (2002) Introduction and ch 1. See also K-D Borchardt, *The ABC of Community Law* (2000) in European Documentation Series, esp. 5–29.

[11] I Macleod, I Hendry, and S Hyett, *The External Relations of the European Communities* (1996) 412.

non-member States to ensure implementation of Council common positions and other instruments—this was already happening to an increasing extent but became a formal obligation.[12] Coordinated action by the Member States in international organizations was another requirement.

27.11 The Common Foreign and Security Policy of the Union must be contrasted with the foreign policy of a sovereign State which, at least in theory, is unconstrained in its objectives, can call on such of its resources as it chooses, has in many cases extensive diplomatic and specialist expertise at its disposal to assist it in formulating its policy, and has automatic entitlements to act at an international level—such as participating in multilateral treaties and joining international organizations which are often not open to the European Community or the European Union. It is a 'common foreign policy' and not a 'single foreign policy' so that it extends only as far as the Member States can agree commitments or guidelines in the European Council or in the Council of Ministers. But increasingly, Member States have endeavoured to reach common positions on key issues, and there have been only a few cases—notably the recognition of the 'former Yugoslav Republic of Macedonia' and the advisability of military action against Iraq in 2003—where there was open disagreement among Member States over policy. On other occasions, however, there have been more subtle differences in what Member States were ready to say or do. Although the commitments in Council instruments may be legally binding they are not in practice enforceable against Member States in the absence of any jurisdiction for the European Court, and they are not 'exclusive' in the sense of precluding Member States from parallel or more extensive action, even if Member States must ensure that their national policies conform to any common position agreed. It is for these reasons that the Member States retain ultimate independence in the conduct of their international relations and so remain fully sovereign.

27.12 The Treaty of Amsterdam which on its entry into force in 1999 amended the Treaty on European Union did not alter the essential structure of the Union, but it did make important improvements to the CFSP.[13] In particular it made available a wider range of legal instruments and defined them more precisely, it provided that in the absence of agreement to the contrary, joint actions agreed within the Council would be financed through the budget of the European Union

[12] See D McGoldrick, *International Relations Law of the European Union*, ch 8 'From European political cooperation to a common foreign and security policy'.

[13] B Soetendorp, *Foreign Policy in the European Union* contains in ch 5 'The common foreign policy decision régime', a straightforward account of the institutional structure of CFSP. See also R A Wessel, *The European Union's Foreign and Security—A Legal Institutional Perspective* (Kluwer, 1999); P Koutrakos, *EU International Relations Law* (Oxford: OUP, 2006) ch 11.

(an issue where lack of a fall-back position had previously led to failures in some critical cases) and there were consolidated and clearer provisions on voting (with qualified majority voting permitted for implementing decisions and where there is 'constructive abstention' by a Member State). The Council was given new powers to appoint a special representative with a mandate for a particular issue or country, and to conclude international agreements. Such agreements concluded by the Council would assume practical importance when the Union later decided to send police and military missions to undertake some of the peacekeeping and crisis management tasks for which it had powers under the security and defence provisions of the new TEU. A High Representative for the Common Foreign and Security Policy would be head of a new Policy Planning and Early Warning Unit in the General Secretariat of the Council. This Unit would enlarge the powers and resources of the team of seconded officials from prior and succeeding presidencies who already provided additional support for the current presidency and would provide independent analysis of events and policy options such as are normally available to ministers from their own ministries of foreign affairs and from embassies overseas. The first High Representative appointed was Javier Solana, a former foreign minister of Spain and secretary-general of NATO who brought political weight as well as negotiating ability to his multiple roles of advising and influencing the Council of Ministers, contributing to the preparation and implementation of foreign policy decisions and acting as representative of the Union in negotiations with non-member countries.

Cooperation among EU Embassies and Consulates Abroad

Article 20 of the Treaty on European Union, as amended, provides that **27**.13

> The diplomatic and consular missions of the Member States and the Commission Delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented.

Since neither the EU nor the EC is a State, neither is entitled to maintain diplomatic relations in the full sense or to send diplomatic missions to non-member States. The European Commission maintains delegations in a very large number of other States, and by courtesy these are often styled diplomatic missions, but the range of diplomatic and consular functions which they are entitled to perform is confined—like their treaty-making powers—to such functions as flow from the powers conferred by Treaty on the Community or the Union. Most of these functions relate to trade and aid, and in developing countries these can be key interests. States seeking to negotiate membership of the

European Union are given extensive assistance with the accession process by the Commission delegations. Furthermore, as Community competence has expanded, so has the range of functions which may be performed by the Commission delegations. By contrast, non-member States accredit ambassadors to the European Union, and these ambassadors and their staff are entitled to exercise all normal diplomatic functions described in Chapter **6** above. How precisely they carry out these functions in Brussels—and in particular whether they seek information from or negotiate with the European Commission, with the presidency, or with the representations of the Member States—will depend on the question of where competence on the particular matter rests.

27.14 Informal cooperation among overseas diplomatic and consular missions of the Member States has grown in parallel with European Political Cooperation and CFSP policies. In foreign capitals policy may be governed by the terms of a Council common position relating to the particular State as well as by more general instruments on, for example, the supply of small arms to areas of conflict or improving standards of governance. In international conferences, collective action will be determined by the terms of a negotiating mandate or sometimes a joint action agreed by the Council of Ministers and specific to the particular conference. In major capitals there are regular meetings, coordination of diplomatic activities such as reporting and negotiating with the host government, and sharing of responsibilities, for example for the preparation of a report on human rights practices. Information and instructions of general interest are circulated to the capitals of all Member States and to the Policy Planning and Early Warning Unit of the Council Secretariat in Brussels under the COREU[14] telegraphic network. In practice, the European Commission will also be involved in this cooperation.

27.15 As already explained in Chapter **16**, paragraph **16.**7 above, it is now standard practice following a breach in relations or withdrawal of a diplomatic mission in a non-member State for the protection of interests of one EU Member State to be entrusted to another. Only where all Member States are implicated in the political reason for the breach will a non-member State be invited to act as protecting Power. When the United Kingdom in 1998 withdrew its mission from Serbia in advance of airstrikes by NATO aimed at securing the withdrawal of Serb military and security forces from Kosovo, other Member States were regarded as vulnerable to retaliation because of their involvement or support and so Brazil was asked to provide emergency assistance to British nationals.[15]

14 Correspondence européenne.
15 *The Times*, 13 October 1998.

27.16 Although Article 6 of the Vienna Convention on Diplomatic Relations permits two or more States to accredit a single ambassador to another State, little use has been made of this possibility by EU Member States. France in particular would be required to amend its Constitution before protection of French interests abroad could be undertaken other than by a French citizen. There has however been a significant rise among Member States in what is termed co-location of diplomatic and consular missions.[16] These are not in any sense joint or EU missions but involve the sharing of premises and support facilities among some or all of the EU missions in a particular capital so as to save costs and enhance security. Sometimes there is a pooling of other functions, but more usually the arrangements do not involve the sharing of archives or communications. Most advanced is a scheme in Abuja, Nigeria, in which almost all Member States participate.

Diplomatic and Consular Protection of European Union Citizens

27.17 It was stressed in Chapters **19** and **20** above that the right to diplomatic and consular protection by a State is available only to nationals of that State, and a receiving or defendant State may reject representations if made by another State on behalf of a person who is not its national. Under the European Community Treaty however a new status of European Union citizen was created, to which were attached certain privileges, and in particular

> Every citizen of the Union shall in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the national of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

Under the rules agreed, protection may cover assistance in cases of death, serious accident or illness, arrest or detention and most of the functions described in Chapters **19** and **20** above, although more delicate matters such as complaints of ill-treatment or requests for pardon or repatriation are normally taken up in liaison with the State of which the EU citizen is a national.[17] Non-member States cannot be obliged to accept representations by a State on behalf of a non-national,

[16] The framework was set out in a Memorandum of Understanding of 1996 signed by all Member States.

[17] The framework was set out in a Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995, OJ L314/73, 28.12.95, and was supplemented by a further decision on detailed implementing measures.

but in practice there appears to have been no public objection. This may however be due to limited knowledge among travellers of the right to assistance from embassies and consulates of other Member States, together with the practice of associating the State of nationality when making politically sensitive representations.

Representation of the Union

27.18 Reference has already been made to the role of the European Commission in negotiating on behalf of the Community on matters where it enjoys exclusive competence, particularly on trade, and to the coordination among embassies of Member States in international organizations, conferences, and foreign capitals. The Treaty on European Union also provides for the representation of the European Union. This is carried out by the presidency currently in office, assisted by the High Representative for the CFSP. The European Commission is to be 'fully associated' and the next following State to hold the rotating presidency may assist. The usual arrangement is for the Union to be represented by a 'Troika' of the presidency, the High Representative, and the Commissioner for External Affairs, but there is flexibility on this and the extent of Community competence over the subject matter of negotiation will be relevant. The Union may appoint a Special Representative for a particular task—for example in 1997 Niels Eriksson was a Special Representative with the task of overseeing assistance to the Palestinian authority in its efforts to counter terrorism. The sustained efforts from 2003 on behalf of the Union to persuade Iran to abandon its programme of enrichment of uranium so as to counter international suspicions that the objective of this was to develop nuclear weapons were led unusually by the foreign ministers of France, Germany, and the United Kingdom who made several joint personal visits to Tehran.

International Organizations

27.19 As explained in paragraphs **27**.2 and **27**.4 above, the Community was from the outset given legal personality and treaty-making capacity, and in GATT it was treated as though it were a party, with the Commission speaking and negotiating on behalf of the Community. Most international organizations however were based on treaties pre-dating the formation of the Community and which permitted only States to become members. The Community began to be admitted as a full member of international organizations only when a new organization was being created or the constitution of an existing organization was—for unrelated reasons—being revised, and where the competence of the Community extended

to the area of activity of the particular organization. The process began with acceptance of the Community as a member of commodity organizations such as the International Wheat Council in 1971 and the International Tin Council in 1956. Later, in 1991, the Community became a member of the Food and Agricultural Organization when its Constitution was revised. The new Constitution of the FAO permitted accession by a regional economic integration organization on condition that a majority of its members were UN members and had transferred 'competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on Member States in respect of those matters'. A Declaration of Competence by the acceding organization was required and there were elaborate rules to preclude double voting by the Community and its Member States. In 1994 the Community at last became a full member of the new World Trade Organization and acceded to the revised GATT—though only after the question whether it had exclusive competence to do so or whether the Member States should also become parties was resolved by the European Court of Justice.[18]

27.20 In organizations where the Community is not a member—whose activities often straddle areas of exclusive Community competence, areas of shared competence between the Community and the Member States (such as development), and areas of Member State competence—the Community (through the European Commission) and its Member States endeavour to speak and vote in accordance with the division of competence between them. Where there is shared competence, a pragmatic approach is taken. The Member States may permit the Commission to act as spokesman as a matter of convenience. The practices of different organizations vary and so long as there is no double voting by the Community and its Member States, other Member States are to an increasing extent flexible and permit the matter to be determined by intra-Community procedures (or sometimes wrangles). Describing the EU as a 'multilayered' international actor highlights, without elucidating, the complexities.[19]

27.21 Where there is no Community competence over the subject matter of negotiations, the obligations of Member States are governed by Article 19 of the Treaty on European Union which requires them to coordinate their positions and to

[18] Opinion 1/94 (*re WTO Agreement*) [1994] ECR I-5267. See also J Sack, 'The EC's Membership of International Organizations' (1995) *Common Market Law Review* 1227; E Denza, 'The Community as a Member of International Organizations' in Emiliou and O'Keeffe, *The European Union and World Trade Law after the GATT Uruguay Round* (Wiley, 1996).

[19] See F Hoffmeister, 'The Contribution of EU Practice to International Law' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford: Oxford University Press, 2008), esp 38–54 on the EU as an actor under international law; P Eeckhout, *External Relations of the European Union*, ch 7 'Mixed external action and membership of international organizations'.

uphold common positions in international organizations and at international conferences. Member States not participating are entitled to be kept informed on any matter of common interest. There is special provision regarding the UN Security Council in the following terms:

> Member States which are also members of the United Nations Security Council will concert and keep the other Member States fully informed. Member States which are permanent members of the Security Council will, in the execution of their functions, ensure the defence of the positions and interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

France and the United Kingdom exercise their Charter responsibilities as permanent members and at the same time reflect Article 19, but they are not mandated by the European Union on individual issues. Frequently there will be two or more other Member States who are elected Members of the Security Council to whom Article 19 also applies. If the Security Council is meeting in a public session open to all members of the United Nations, it is usual for the presidency to represent the Union. The general practice in all international organizations where exclusive Community competence does not apply (so that the European Commission is not entitled to act as spokesman and negotiator) is that the presidency coordinates and takes the lead in presenting common positions of the Union, but that other Member States may also speak provided that the substance of their intervention conforms to the agreed common position. If the Member State holding the presidency is not represented in that organization, it will fall to the State next in line to hold the presidency, and represented, to arrange coordination and to speak for the Union.

Political Sanctions and Cross-pillar Action

27.22 Reference was made above to the requirement in the TEU that the Union should ensure the consistency and the continuity of its activities and the responsibility of the Council and the Commission to cooperate to this end. It is not legally permissible to draw up instruments based both on powers in the First Pillar and powers in the Second (CFSP) Pillar—not only are the institutional procedures for adoption distinct but the instruments themselves differ in their legal effects. In some contexts however the Council may adopt related instruments under the First and the Second Pillars which are intended to operate as a consistent whole. One example of this results from common strategies—a form of Second Pillar instrument introduced by the Treaty of Amsterdam. Common strategies are themselves decided by the European Council in areas where the Member States have important interests in common, and they specify for these areas objectives

and means to be made available by the Council and the Member States.[20] They lack however the precision of formal legal instruments so that implementing instruments must be adopted either by the Council—which may act under any one of the three pillars—by the Member States at national level, or by the Commission. Policies regarding particular countries such as Iran, China, and Afghanistan or particular topics such as improving observance of human rights or responding to a natural disaster may also involve adoption by the institutions of inter-related instruments based on Community and on intergovernmental powers.[21]

27.23 The classic example of cross-pillar action which has assumed considerable importance is the imposition by the Union of political sanctions against non-member countries. Before the TEU, as was explained in paragraph **27**.7 above, sanctions were at first imposed through national legislation by Member States following a political agreement and later by Community legislation under powers intended to implement the common commercial policy.[22] The TEU by contrast provided a clear system under which the political decision would be taken by the Council under Second Pillar (CFSP) powers but implemented under specific First Pillar powers or by Member States (depending on competence for the specific sanction). Article 301 of the EC Treaty provides

> Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by qualified majority on a proposal from the Commission.

There is parallel power in Article 60 of the EC Treaty for the Council to take urgent measures to block movements of capital and payments—used to freeze the bank accounts of persons or entities suspected of involvement in terrorism. In this case because of the need for urgency Member States may take unilateral measures to freeze the assets of suspects on the condition of informing the Commission before they enter into force. Community powers may now also be

[20] Common strategies were adopted for Russia and the Ukraine in 1999 and for the Mediterranean in 2000—following which the instrument fell into disuse, possibly because it opened the way to implementing decisions taken by qualified majority voting or because the approach was too broad brush. See P Koutrakos, *EU International Relations Law* (Oxford: Oxford University Press, 2006) 394–9.

[21] Many examples are described in U Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union* (Cambridge: Cambridge University Press, 2008).

[22] Article 113 (later Article 133) EC. The powers were limited to trade in goods and their use for a political objective (for example against Argentina following its invasion of the Falkland Islands) was disputed within the Council.

used to block exports of dual-use goods (items such as water cannon which may be used for either military or civilian purposes), but because the Community lacks competence over trade in arms, arms embargoes must be enforced through national measures.

27.24 Sanctions are now usually applied by the EU to give effect to Security Council (SC) resolutions, but this is not a pre-requisite, and EU sanctions may also go beyond what is required by the terms of the SC resolution. Sanctions against Libya imposed by the Security Council were for example implemented by the EU in a strengthened form at the instance of the United Kingdom and France whose nationals had been victims of specific Libyan acts of aircraft sabotage. In either of these cases, however, the sanctions are not permitted to override or violate existing obligations of the Community or of the Member States under international law[23] unless specifically authorized by a relevant resolution of the SC. The modern approach to sanctions often involves applying them not to particular non-member countries and their nationals but to named individuals—either thought responsible for the situation in a particular country or involved in terrorist activities. This 'smart sanctions' approach has given rise to constitutional difficulties for the Union in part because express powers for this method of imposing sanctions were not provided in amendments to the Treaties and in part because the procedures can result in individuals being deprived of their financial assets without a proper chance to hear and respond to the case against them. The European Court of Justice in the *Kadi* case[24] held that although UN Security Council resolutions have primacy over European Union laws as well as over national laws, the Council implementing instruments could be reviewed by the Court to ensure compliance with fundamental human rights—in particular the right to be heard and to effective judicial review. The UN obligations would remain valid under international law—but it could follow that the Member States, through complying with EU requirements, find themselves in breach of the requirements imposed by the UN. Efforts however continue to reform both the system of UN sanctions and the ways in which they are given effect at the level of the Union and its Member States.

Security and Defence

27.25 In its early years, the Community was rigorously excluded even from discussion of matters relating to security and defence. Production of or trade in arms was

[23] Case C-162/96, *Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655.

[24] Joined Cases C-402/05 and C-415/05, *Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the EC*. Judgment of 3 September 2008 not yet reported.

ring-fenced from Community rules, and collective defence of the territories of the Member States was the responsibility of NATO. Ireland continued to attach importance to its neutral status, and the enlargement of the Union brought in three other neutral Powers—Austria, Sweden, and Finland. Denmark though a member of NATO has also been reluctant to accept the involvement of the EU in defence. Successive revisions of the Treaties envisaged 'the progressive framing of a common defence policy' while acknowledging the special position of the neutral Member States. For a time the Union borrowed the resources of the Western European Union (WEU) for limited activities (such as the policing of the embargo on supply of arms to the Federal Republic of Yugoslavia in the early 1990s). But this arrangement was never really satisfactory because of institutional difficulties and different memberships of the two organizations. The TEU made provision for what are called 'the Petersberg tasks' which include humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management including peace-making, all aimed at external conflict resolution. They provide an additional tool to make the Common Foreign and Security Policy more effective.[25] These do not involve territorial defence of the Member States which, for those who are members, is a task for NATO.

27.26 In 1998, in the Declaration of St Malo, France and the UK—the two key Member States in military matters by reason of their permanent membership of the UN Security Council as well as their nuclear capability—determined that 'the Union must have the capacity for autonomous action, backed up by credible military forces, the means to use them, and a readiness to do so'. Since then the Union has gradually built up military planning resources and set goals for the capabilities which Member States should provide. It no longer relies on WEU. The EU will launch and conduct military operations only where NATO as a whole is not engaged. This was formalized in the revision of the TEU in 2000 by the Treaty of Nice. The Union has an understanding with NATO, the so-called Berlin plus arrangements, under which approval can be given for the Union to draw on certain NATO assets to conduct operations. Or the Union can act autonomously, using only capabilities provided by its Member States. The Treaty revision also formally established a new Political and Security Committee of the Council in order to monitor areas covered by the CFSP and to assist the Council in defining policies and assuming political and strategic control of crisis management operations.[26] In 2003 the European Council on the initiative of the High Representative adopted a European Security Strategy which drew some inspiration from the

[25] For a comprehensive account of methods used by the EU to this end, see W Kronenberger and J Wouters (eds), *The European Union and Conflict Prevention* (Asser Press, 2004).

[26] Article 25 TEU, as revised by the Treaty of Nice.

US Security Strategy but contained important differences. The European Security Strategy identified the key threats to the Union as terrorism, proliferation of weapons of mass destruction, regional conflicts, state failure, and organized crime. The Strategy also laid emphasis on 'an international order based on effective multilateralism' and on the primary role of the UN Security Council for maintenance of peace and security.[27] Technical military capacity was strengthened by the establishment in 2004 by Council Joint Action[28] of a European Defence Agency which will enhance cooperation and integration among Member States in the development of and trade in military equipment—so resulting in greater capability for the same expenditure.

27.27 In subsequent years the EU has developed its military planning capacity and has launched numerous crisis control missions both military and civilian in character in countries ranging from Macedonia and Bosnia to the Democratic Republic of Congo, Indonesia, Afghanistan, Georgia, and Iraq. Although their purposes varied, all had the consent of the country where they were deployed, were relatively low-key, invariably involved a range of policy aspects—from military, policing, support for better governance, enforcement of the rule of law, and institution-building—were usually mandated by a Security Council resolution, and were on the whole successful. Jurisdiction over personnel provided by the Member States as well as their privileges and immunities were regulated under status of forces agreements in each case concluded by the Council on behalf of the European Union. Article 24 of the TEU as amended by the Treaties of Amsterdam and Nice confers express power on the Council to conclude international agreements within the framework of the CFSP, although there remains an element of doubt whether the EU as yet enjoys full international legal personality so as to eliminate potential responsibility of contributing Member States should liability for damage arise (and the early practice has been for claims to be settled directly between the claimant State and the Member State whose forces were directly involved). At the outset these agreements conferred on all EU personnel a very high degree of diplomatic immunity and privilege going well beyond what is normally accorded to visiting forces under modern practice and difficult to justify on functional grounds. Subsequently however the Council adopted a model Status of Forces Agreement (SOFA) and a model Status of Missions Agreement (SOMA) for civilian crisis management operations, both

[27] P Koutrakos, *EU International Relations Law*, ch 13 at 461–2.
[28] 2004/551/CFSP, OJ L245/17, 12.7.2004.

in somewhat more limited terms, and these have been used as the basis for negotiations with third countries.[29]

Constitutional Change

Following the adoption of the Treaty of Nice in 2000, the European Council at Laeken in 2001 set in motion a process which was originally intended to look at ways of bringing the Union closer to its peoples, to clarify the definitions and the division of competences within the European Union, and to simplify its structures. There followed a Convention on the Future of Europe which proposed radical change in the form of a draft Constitution, the adoption in 2004 by the heads of state and of government of a Treaty establishing a Constitution for Europe and its rejection in 2005 by the voters in France and the Netherlands. In 2007 the heads of state and government in Lisbon adopted a Reform Treaty[30] containing most of the institutional changes in the earlier Treaty but without many of the features which had been criticized as threatening the sovereign independence of the Member States. The principal changes in the Treaty of Lisbon are described in Chapter **26**, paragraph **26.**21 above. Its entry into force would also make substantial changes to the system of external relations described in this chapter. The most significant are the following: **27.28**

1. The European Union would be granted express legal personality, which would subsume the legal personality of the European Community. The Union would 'replace and succeed the European Community'. Although the First and Second Pillars would no longer be formally distinct, the common foreign and security policy would be 'subject to specific rules and procedures'.
2. A new post of High Representative of the European Union for Foreign Affairs and Security Policy would take over the external relations functions of the existing High Representative but also those of the European Commissioner for External Affairs. This is intended to give consistency and a higher profile to the external representation of the Union—but it is not clear where his loyalties would lie in case of institutional conflict between the European Commission and the Council.

[29] See Chapter **21** above. For a comprehensive account see A Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice' (2008) *EJIL* 69 and 'The Conclusion of International Agreements by the European Union in the context of the ESDP' (2008) *ICLQ* 55.

[30] [2007] OJ C306/1.

3. A new External Action Service would be built up on the basis of the existing Commission Delegations, strengthened by secondments from the Council Secretariat and from national ministries of foreign affairs. The service would work in cooperation with the diplomatic services of the Member States. It is likely that to some extent this can be done under existing Treaty powers.
4. There would be an expansion of the competence granted under the common commercial policy to include explicit mention of trade in services, commercial aspects of intellectual property, and foreign direct investment. Ireland rejected the Lisbon Treaty in a referendum, the German Federal Constitutional Court insisted on further German legislation before ratification, while Poland and the Czech Republic withheld ratification pending the outcome of a second Irish referendum in October 2009.

28

OTHER INTERNATIONAL AND REGIONAL ORGANIZATIONS: COMMONWEALTH, NATO, COUNCIL OF EUROPE, OAS, AU, ASEAN, CIS, FRANCOPHONIE, ARAB LEAGUE, ORGANIZATION OF THE ISLAMIC CONFERENCE, OSCE

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The Commonwealth

Balfour Definition

28.1 The idea of the Commonwealth goes back to the nineteenth century when, after Canada had become a self-governing Dominion, the future prime minister, Lord Roseberry, referred to the Empire as a Commonwealth of Nations. (Neither Canada nor the other subsequent Dominions achieved equality with Britain when they became Dominions. They remained subordinate even though, by the start of the twentieth Century, the Colonial Office would have hesitated to interfere. Thus, until the First World War, all formal official communications with London had to go through the Governors General and the Dominions had no international personality.) This changed with the first modern definition of the Commonwealth of Nations enshrined in the formula associated with Lord Balfour which issued from the Imperial Conference of 1926. The status of the group of self-governing communities composed of Britain and the Dominions was described as follows:

> They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations'.[1]

[1] The Imperial Conference 1926, Summary of Proceedings, Cmd 2768. At that time the self-governing Dominions were Canada, Australia, New Zealand, the Union of South Africa, and the Irish Free State. Newfoundland is also mentioned in the Statute of Westminster, (it was also a dominion until 1934) but is omitted from the previous sentence as its constitutional development led away from independent international status.

Statute of Westminster

28.2 Under the Statute of Westminster 1931, passed by the British parliament, certain remaining restrictions on the powers of Dominion parliaments were removed. The Statute provided, inter alia, that:

1. Dominion Parliaments had full power to make laws having extra-territorial operation.
2. The Colonial Laws Validity Act 1865, should not apply to any law made by a Dominion Parliament.
3. Future laws made by a Dominion Parliament should not be void or inoperative on the ground of repugnancy to the law of Britain and that Dominion Parliaments henceforth had power to repeal or amend any such Act, order or regulation in so far as it was part of the law of a Dominion.
4. No future Act of the British Parliament should apply to a Dominion as part of its law.

The turning point

28.3 The turning point in the history of the Commonwealth came with the London Declaration of April 1949, in which member countries accepted India's intention to adopt a republican constitution, at the same time continuing 'her full membership of the Commonwealth of Nations and her acceptance of The King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth'.[2]

28.4 It was also in 1949 that the title 'Commonwealth of Nations' was first used as an alternative to the former title 'British Commonwealth of Nations', which in time it replaced completely. Nowadays it is simply referred to as the Commonwealth. Thus, the concept of the Commonwealth has changed from a group of countries owing allegiance to a single crown, to an association of sovereign independent

[2] The Declaration regarding the future of the Commonwealth was incorporated in the communiqué issued at the end of the Commonwealth Prime Ministers Meeting in April 1949. The relevant text is as follows:

> The Government of India have informed the other Governments of the Commonwealth of the intention of the Indian people that under the new Constitution which is about to be adopted India shall become a sovereign independent Republic. The Government of India have, however, declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of The King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth.
>
> The Governments of the other countries of the Commonwealth, the basis of whose membership of the Commonwealth is not hereby changed, accept and recognise India's continuing membership in accordance with the terms of this Declaration.

nations which includes alongside those members both republics and countries with their own monarchs.

28.5 Since 1950, some 46 former dependent territories have become independent and full members of the Commonwealth. Member countries (2009) number 53.[3] Today the Commonwealth is, after the UN and its Specialized Agencies, one of the world's largest inter-governmental organizations, with more than a quarter of the UN's membership, about a third of the world's population, and about a fifth of the world's trade.

Freedom of decision

28.6 In 1947, on the occasion of the Burma Independence Bill, the then British Prime Minister, Clement Attlee, emphasized that 'The British Commonwealth of Nations is a free association of peoples, not a collection of subject nations'. Burma was thus free to become an independent State outside the Commonwealth and it so decided, as did Ireland under the Ireland Act of 1949. The Sudan took the same course in 1956 and between that date and 1967 British Somaliland and Protectorate,[4] Kuwait, Southern Cameroons, and the South Arabian Federation (including Aden)[5] ended their earlier, sometimes tenuous, imperial connections. By contrast Namibia and Cameroon joined the Commonwealth in 1990 and 1995 respectively and Mozambique which had had no imperial connection with Britain joined in 1995.[6]

28.7 Of the above countries only Ireland had enjoyed the status of member country of the Commonwealth at the time of decision. The Union of South Africa on its declaration of a republic in 1961 and Pakistan in 1972, following the recognition by Commonwealth governments of Bangladesh, the former east wing of Pakistan, as an independent State, also voluntarily ceased existing membership. There has been no case of any country being expelled. The withdrawal of South Africa in 1961 was, however, due to what was felt to be the pressure of the majority of Commonwealth governments on the South African government for an essential change in the system of racial *apartheid* to which the South Africans were not willing to agree. South Africa was readmitted to the Commonwealth in 1994 after the end of *apartheid.* Pakistan rejoined in 1989. In recent times,

[3] A full list of current member countries is to be found at <http://www.thecommonwealth.org>.

[4] Now Somalia.

[5] Now Southern Yemen.

[6] L Lloyd, *Diplomacy with a Difference: the Commonwealth Office of High Commissioner, 1880–2006* (Leiden; Boston: Martinus Nijhoff, 2007) 278–9.

several members have been suspended from the councils of the Commonwealth for failing to uphold democracy. The Fiji Islands, Nigeria, and Pakistan have all been suspended and re-admitted. Fiji is currently (2009) re-suspended. Zimbabwe was suspended in 2002 and withdrew from the Commonwealth the following year when the Abuja Commonwealth Heads of Government Meeting (CHOGM) decided to maintain Zimbabwe's suspension.

28.8 From 1949 on, as numerous dependent territories assumed independent status, a preponderance of countries opted for republican status either at the time of transition or shortly afterwards. On the other hand, some traditionally monarchical communities retained their own monarchies.

Head of the Commonwealth

28.9 Despite such wide constitutional divergences, one common factor remains: that of the Queen as the symbolic head of the Commonwealth. No specific functions attach to this title as such, though the Queen issues a Commonwealth Day Message and addresses the Opening Ceremony of CHOGM. Nor has it any constitutional significance. It is, however, seen as the outward and visible mark of the special Commonwealth relationship. Today the Queen is head of state in 16 of the 53 Commonwealth member countries, all of them fully independent. When the Queen dies or were she to abdicate, her heir will not automatically become head of the Commonwealth. It will be up to the Commonwealth Heads of Government to decide on a successor as head.

Governors-General

28.10 In those member countries apart from Britain where she is head of state, the Queen is represented by a Governor-General. He or she is charged with many, though not all, of the functions performed in Britain by the sovereign personally, such as the summoning, proroguing, and dissolution of Parliament, the giving of the Royal Assent to Bills, the appointment of cabinet ministers and judges and the issuing of credentials. The Governor-General is not the representative or agent of the British government or of any department of that government.

28.11 At the Imperial Conference of 1930 it was agreed that a Governor-General should be appointed on the advice of ministers of the Dominion concerned and not, as formerly, of British ministers.

28.12 In Australia the sovereign is still also represented in each State by a Governor. Their functions are generally similar to those of a Governor-General, except that since 1986 they are appointed formally on the advice of the state premier. Previously a Governor was appointed on the advice of British ministers.

Commonwealth Heads of Government Meetings (CHOGM)

28.13 While ministerial and functional conferences now take place throughout the Commonwealth on an increasing scale, ranging from gatherings, sometimes in a UN context, of ministers of foreign affairs, finance, justice, health, or trade to those of cabinet secretaries, officials, or technicians, the meetings of heads of government have become the most obvious symbol of continuing Commonwealth cooperation. When such meetings were resumed in 1944, they took on a more informal character than the pre-war Imperial Conferences. (They were known as Prime Ministers' Meetings until 1971 when they were re-named CHOGMs.) During the two following decades they were held almost without question in London under the chairmanship of the British prime minister of the day. Servicing of the meetings remained in the joint hands of the British Cabinet Office and of the Dominions (later Commonwealth Relations) Office. Even following the independence of India, Pakistan, and Ceylon in 1947–8, the gatherings remained small (not surprisingly given the smallness of the Commonwealth at that time) and retained something of a family atmosphere.

28.14 It was not until 1966, shortly after the unilateral declaration of independence by Rhodesia, that a further precedent was set. In that year not only were two Heads of Government meetings held, but for the first time one of them took place outside London—in Nigeria—and was devoted to the single subject of Rhodesia. While a further conference was convened in London in 1969, the concept of 'rotation' is now firmly established. Recent CHOGMs have taken place in Abuja, Valletta, Kampala, and Port of Spain (2009).

28.15 Each meeting since 1947 has seen a gradual widening in membership, to a point where heads of government have had to devise new procedures in order to preserve the confidentiality and informality of their discussions. One marked departure from earlier conferences was the growing habit of heads of government of foregathering in restricted session or a retreat with no more than one and sometimes no adviser present. The British government caused controversy at the 1997 summit in Edinburgh by reducing the much cherished (particularly by the smaller members) weekend retreat to five and a half hours thus leaving virtually no time for relaxing and meeting each other informally.

The Commonwealth Secretariat

28.16 With the growing numbers of Commonwealth members, the increasing complexity of the issues that presented themselves, and the differences that arose between the various Commonwealth governments, there was general recognition by the mid 1960s that the time had come to set up a secretariat on a Commonwealth-wide basis. At a Conference in London in July 1964 the heads

of government decided to establish a Commonwealth Secretariat. They regarded this body as being 'at the service of all Commonwealth governments' and as 'a visible symbol of the spirit of cooperation which animates the Commonwealth'. The Secretariat was set up at Marlborough House, a royal palace.

28.17 The first secretary-general to be appointed was Mr Arnold Smith, a senior Canadian diplomat. In the first 11 years of its life, under Mr Smith and his successor Sir Shridath Ramphal, a distinguished legal and political personality from Guyana, the Secretariat developed from being, as originally understood, a servicing organization into an initiator of programmes in the fields of development, technical cooperation, health, youth affairs, and education and, within the limits imposed by differences of alignment (political, defence, and regional) between individual members, a coordinator of Commonwealth policies and activities. It is worth adding that both interpreted their roles dynamically and played a prominent role in combating racism in southern Africa. The Secretariat also effectively took over the prerogative of organizing Commonwealth meetings at the high political level which had hitherto lain traditionally with the British government. Sir Shridath Ramphal was succeeded by Chief Emeka Anyaoku and Mr Don McKinnon. The current secretary-general is Mr Kamalesh Sharma, a former senior Indian diplomat.

Organization within the British government

28.18 Over a period of some 50 years, organization within the British government was adapted to meet the changing needs of the Commonwealth. A separate Department of State called the Dominions Office had first been established in 1925. On 15 August 1947, the day of Independence for India and Pakistan, the name of the Office was changed to Commonwealth Relations Office, and it assumed responsibilities for British relations with these countries.[7] With the process of independence continuing apace in the next two decades, most of the territories which had been administered by the Colonial and the Dominion Offices became the responsibility of the Commonwealth Relations Office. It was decided in 1966 that the remaining responsibilities in this field no longer justified the maintenance of a separate Colonial Office, which was accordingly absorbed by the Commonwealth Relations Office, then renamed Commonwealth Office.[8]

[7] The newly named department thus took over the work of the former India Office in so far as that remained appropriate to the changed conditions.

[8] *The Merger of the Foreign Office and the Commonwealth Office 1968* (1968). This publication gives a clear, brief account not only of this later merger but of its historical background.

28.19 In the same year, the staffs of the Foreign Office and the Commonwealth Relations Office were combined to form a single Diplomatic Service (though the two Departments remained separate). On 16 October 1968 the Foreign Office and Commonwealth Office were merged to form the Foreign and Commonwealth Office. This history of splits, mergers, and re-mergers is symbolic of how, in less than 50 years, an empire evolved into a lively association of independent States, and it emphasizes the important role which the Commonwealth Secretariat had assumed as an active focal point of the Commonwealth system.

The conduct of British relations with other member countries of the Commonwealth

28.20 Since 1968 the Secretary of State for Foreign and Commonwealth Affairs has been responsible for the conduct of relations with other member countries of the Commonwealth and for the administration of the remaining British dependencies. Although the conduct of diplomatic business between Commonwealth governments is carried out in much the same way as that with foreign countries, Commonwealth high commissioners and their staffs in London traditionally deal direct with a wider range of government departments, and in general in a more informal manner, than do most of their foreign counterparts.[9]

Membership of the UN

28.21 All members of the Commonwealth have permanent representatives at the seat of the UN in New York.

Diplomatic representation

28.22 In accord with its estimate of its needs and the requirements of its national budget each member government accredits ambassadors or consular representatives to foreign countries. Within the Commonwealth, however, a head of mission is styled 'high commissioner' rather than 'ambassador', and the office 'high commission'.

High commissioners

28.23 All high commissioners, to whatever Commonwealth country they may be accredited, have a status equivalent to that of ambassador. So far as Britain is concerned, its high commissioner will be either the representative of the British government or, in those Commonwealth countries whose head of state is other than the Queen, her representative. The duties of a high commissioner from any

[9] For direct contacts between diplomatic missions and government departments other than those regularly responsible for external affairs, see Chapter **2**, paragraph **2**.19.

Commonwealth country will be similar to those of a foreign ambassador, namely to advise his government on the politics of the country to which he is accredited, to interpret and project the policies of his own country, and to look after its interests.

28.24 The first high commissioner to hold the post of doyen of the diplomatic corps was in Canada in 1951. By the mid-1950s high commissioners were entitled to hold this position in all capitals other than London. Finally since 1972, when the then High Commissioner for Jamaica in London, Sir Laurence Lindo, became doyen, it has become accepted practice even in London that a high commissioner may assume this role among the corps.

Privileges and immunities

28.25 Article 14 of the Vienna Convention of 1961 on Diplomatic Relations contains a special provision enabling high commissioners to be included in the first class of heads of mission. This class comprises 'ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank'. High commissioners are technically not 'accredited' when the countries between which they are exchanged share the same head of state.[10] Since high commissions have the status of diplomatic missions, all privileges and immunities under the Vienna Convention are accorded on that basis. The United Kingdom in one respect extends more favourable treatment to members of Commonwealth high commissions than is extended to members of other diplomatic missions. A member of a Commonwealth High Commission who is a dual citizen (of the sending country and also of the United Kingdom) is treated as though he were not a UK citizen in that he does not lose his privileges and immunities because he is a 'national of the receiving state'.

Agents-general

28.26 While the Commonwealth of Australia and Canada are represented in London as sovereign States by high commissioners, the constituent states of Australia and the provinces of Canada are separately represented by agents-general. The agents-general are not diplomatic agents under the Vienna Convention, but under the Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1971 they, their families, their staffs, and their offices are accorded privileges and immunities on the scale set out in the Vienna Convention on Consular Relations 1963. They are not, however, entitled to any special precedence.

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10 See Chapter 7, paragraph 7.27.

Consular functions

28.27 By long-standing convention, the practice between Commonwealth member governments had been that those of their citizens living in another country of the Commonwealth would look to the government of that country for protection rather than to their own diplomatic or other representative. Consular functions, and likewise consular titles, were deemed unsuitable to the Commonwealth relationship. Thus, in those Commonwealth countries (as previously in Pakistan), where the interests of Britain dictated the need for a presence outside the capital, for example in Canada, Australia, New Zealand, India, or later in the Federal Republic of Nigeria, British representatives were, with the agreement of the receiving member country, styled variously as 'Deputy High Commissioner' or 'Senior Trade Commissioner'. Such officers were treated as members detached for local service from the diplomatic staff of the British High Commissioner in the capital concerned.

28.28 In 1970, however, given the continuing expansion in the independent membership of the Commonwealth, the question of consular relations was raised on the initiative of the government of New Zealand. Two years later senior Commonwealth officials met in London to examine the problem. While no formal agreement resulted, the consensus of the Conference was that it should be considered an acceptable practice to make consular appointments within the Commonwealth and to discuss the adoption of consular titles.

28.29 Some functions which are consular in nature, such as trade, welfare, and immigration, are carried out by representatives whose titles are varied—trade commissioners, immigration officers, and assistant commissioners are among those used. In Britain these officers are also given privileges and immunities on the consular scale under the Commonwealth Countries and Republic of Ireland (Immunities and Privileges) Order 1971. The privileges and immunities accorded in Britain to the Commonwealth Secretariat are set out in the Commonwealth Secretariat Act 1966 which was needed as the Commonwealth was not an international organization which could be given status, privileges, and immunities under the UK's International Organizations Act.

Registration of intra-Commonwealth agreements with the UN

28.30 Since the establishment of the UN, it was agreed by all members of the Commonwealth that agreements concluded since 24 October 1945 should be registered with the UN, saving those which merely amended or modified agreements concluded before that date, and certain other classes of agreement not regarded as registrable when concluded between foreign countries.

Links with the Judicial Committee of the Privy Council

28.31 For so long as the Crown remained one and indivisible it had been looked to throughout the Empire, and indeed as recently as 1947, as the 'Fountain of Justice'. Appeals thus lay by right or by special leave from higher courts overseas to the Judicial Committee. But once it proved possible, from 1949 onwards, to accommodate republics within the Commonwealth, links with the Judicial Committee suffered much attrition. In the majority of countries appeals have terminated often following controversial cases, eg the imposition of death penalties in cases in the Caribbean. Efforts to establish an alternative worldwide court, or a series of regional Commonwealth courts, have failed. However, a number of member countries, namely the Commonwealth realms of Antigua and Barbuda, The Bahamas, Belize, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Tuvalu and the Commonwealth of Dominica, Mauritius, Trinidad and Tobago, and if the case involves constitutional rights, Kiribati, still maintain the right of appeal to the Judicial Committee.

North Atlantic Treaty Organization (NATO)

28.32 At the end of the Second World War, Western Europe faced the need firstly, to repair the physical destruction and human deprivation and secondly, to take necessary precautions against any danger from the Soviet Union and its allies. The first was obvious for all to see. The second showed itself in numerous ways, one of the most conspicuous being the commitment of the Western Powers to a united Germany democratically governed, as opposed to the Soviet policy of keeping Germany divided with one zone in the east under a Communist régime. The Western governments accepted that there would need to be arrangements between them not only for mutual economic help (which could perhaps be shared with the East), but also for physical defence not simply against a possible revival of German power, but also against potential dangers from the East, both to military security and to human rights and individual and national freedoms as understood in the West.

Treaty of Dunkirk

28.33 The first post-war Western European agreement for mutual defence was the 50-year Treaty of Alliance and Mutual Assistance entered into by the United Kingdom and the French Republic at Dunkirk on 4 March 1947. This was largely superseded by more comprehensive agreements signed later.

The Brussels Treaty

28.34 *Signature and provisions.* The Brussels Treaty was signed on 17 March 1948 between the United Kingdom, France, Belgium, the Netherlands, and Luxembourg.[11] It was described as a 'Treaty of Economic, Social and Cultural Collaboration and Collective Self-defence'.

28.35 In addition to undertaking immediately to consult together with regard to any situation which might constitute a threat to peace in whatever area this threat should arise, and also in the event of a renewal of an aggressive policy by Germany, the Five Powers entered into a specific engagement for automatic mutual support in the case of aggression against any one of them in Europe.

28.36 *Machinery.* Article VII of the Treaty provided for the creation of a Consultative Council as a permanent means of consultation on all questions dealt with in the Treaty. In 1948 this Council, which consisted of the foreign ministers of the parties to the Treaty, set up a Permanent Defence Organization, which became the Western European Union (WEU). A Finance and Economic Committee was also set up under the direction of the Five finance ministers. In 2000, WEU ministers agreed to the transfer of the organization's capabilities and functions to the EU under its developing European Security and Defence Policy. The WEU is now relatively dormant but its parliamentary dimension continues.

The North Atlantic Treaty

28.37 The Brussels Treaty provided a framework for cooperation between the five Western European Allied Powers. But even at the time of its signature there was a growing realization on both sides of the Atlantic that a wider alliance, combining the strengths of Europe and North America, would be essential. On 28 April 1948 '. . . the idea of a single mutual defence system, including and superseding the Brussels Treaty, was publicly put forward by Mr St Laurent [Prime Minister of Canada] in the Canadian House of Commons'.[12] A bipartisan resolution in the US Senate embodying what would be for the US an unprecedented overseas commitment was adopted on 11 June. Talks immediately began with the governments of the Brussels Treaty countries, and by the end of October, agreement had been reached on 'the principle of a defensive pact for the North Atlantic area'. The Brussels Treaty Powers and Canada and the United States invited Denmark, Iceland, Italy, Norway, and Portugal to accede to the proposed North Atlantic Treaty so that on 4 April 1949, the Treaty was signed in Washington on behalf of

11 Cmd 7599.

12 These words are quoted directly from *NATO, Facts and Figures* (Brussels, 1976) because they represent a brief, authoritative definition of what was to happen.

these 12 countries.[13] It came into force on 24 August 1949. Greece and Turkey were invited to join the Alliance in 1951 and acceded on 18 February 1952. The Federal Republic of Germany was invited to accede to the Treaty following the signature of the Paris Agreements (see below) in October 1954, and formally became a member of NATO on 9 May 1955.

The Paris Agreements

28.38 In 1950 the question of obtaining a German contribution to the security of the West became urgent. While there was general recognition that Germany should participate in her own defence and in that of Western Europe, there was also a natural reluctance in Europe, and particularly in France, to allow uncontrolled German rearmament. The French government thereupon proposed a compromise arrangement which came to be known as the 'Pleven Plan'; Germany should be rearmed within a European army in which national units would be welded together under a supranational command. Effect was given to this idea in the European Defence Community (EDC) Treaty signed in Paris on 27 May 1952, by France, the Federal Republic of Germany, Italy, Belgium, the Netherlands, and Luxembourg.[14]

28.39 In August 1954, however, the French National Assembly finally decided not to accept the EDC Treaty. In consequence it became necessary to establish new arrangements for the integration of the Federal Republic of Germany into the Western system of security and at conferences held in London and Paris that autumn attended by the United Kingdom, the United States, and Canada as well as by the six Powers of the abortive European Defence Community, certain fundamental conclusions were reached.[15] These included:

1. the decision of the United Kingdom, the United States, and France to terminate the occupation régime in the Federal Republic of Germany;
2. the decision of the Brussels Treaty Powers to invite the Federal Republic of Germany and Italy to accede to the Brussels Treaty, to modify that Treaty so as to emphasize the objective of European unity, and to strengthen the Brussels Treaty Organisation (BTO) by giving it work to do in connexion with fixing the levels of the maximum defence contributions to NATO of all members of BTO and with the control of armaments on the Continent of Europe of the continental members of BTO;
3. certain assurances given by the United States and the United Kingdom with regard to the maintenance of armed forces on the Continent of Europe,

[13] Cmd 7789.
[14] Cmd 9127.
[15] Cmd 9289.

as well as a declaration by Canada reaffirming its resolve to discharge the continuing obligations arising out of its membership in NATO and its support of the objective of European unity; and

4. the decision of those Powers represented at the Conference which were members of NATO to recommend at the next ministerial meeting of the North Atlantic Council that the Federal Republic of Germany should forthwith be invited to become a member.[16]

The provisions of the North Atlantic Treaty

28.40 The preamble affirms the determination of the parties

> to safeguard the freedom, common heritage and civilisation of their peoples . . . to promote stability and well-being in the North Atlantic area . . . to unite their efforts for collective defence and for the preservation of peace and security.

28.41 Article 1 significantly relates the Atlantic Treaty and the future actions of the Alliance to the purposes and actions of the United Nations. Thus in Article 1,

> The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

28.42 The signatories undertook to contribute towards the further development of peaceful and friendly international relations 'by strengthening their free institutions . . . and by promoting conditions of stability and well-being' and to seek 'to eliminate conflict in their international economic policies. . . .'[17] (Article 2). They undertake to 'maintain and develop their individual and collective capacity to resist armed attack' (Article 3) and to 'consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened' (Article 4).

28.43 In Article 5, the parties

> agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

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[16] Cmd 9304.

[17] It is characteristic of those who work in NATO to emphasize that the Preamble and Article 2 are not routine sentiments but genuinely animate the work of the Organization.

28.44 Article 6 describes the circumstances in which Article 5 becomes operative. Since the accession of Turkey, Article 6 has read:

> For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:
>
> (i) on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of Turkey or on the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
> (ii) on the forces, vessels or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.[18]

Machinery

28.45 Given the different conditions which prevailed in comparison with those attending the formation of the United Nations, the Atlantic Treaty did not attempt to set up a constitution. The Treaty delegated this power to the new organization in these words (Article 9):

> The Parties hereby establish a Council, on which each of them shall be represented to consider matters concerning the implementation of this Treaty. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.

28.46 The first meeting of the Council was held in Washington on 17 and 19 September 1949. Since the Treaty was an instrument negotiated by foreign ministers, the Council consisted of the foreign ministers of the member countries.[19] They immediately created a Defence Committee, consisting of ministers of defence, and a Military Committee, consisting of national chiefs of staff, with an executive body, the Standing Group, comprised of France, the United Kingdom, and the United States and responsible for strategic guidance in areas in which NATO forces would operate.

28.47 But in 1950 the Alliance lacked two essentials. First, the edifice had no unified apex, a situation which would mean weakness and delay in an emergency. At its Brussels meeting in December 1950, the Council agreed to create an integrated

[18] Protocol Regarding the Accession of Greece and Turkey to the North Atlantic Treaty of 4 April, 1949; signed in London on 17 October, 1951 (Cmd 8407).

[19] The Council can meet at any level from head of government, or head of state, to permanent (official) representative, subject to the agreement of member governments on the appropriateness of the subject to the level of the meeting.

European Defence Force and a Supreme Headquarters under the command of an American officer. President Truman was invited to designate General Dwight D Eisenhower as Supreme Allied Commander (SACEUR). The President agreed and General Eisenhower accepted.[20]

28.48 On the civilian side the Council decided at its meeting in London of 15–18 May 1950 to set up a civilian body to execute its directives, coordinate the work of the Alliance's civilian and military bodies, and act as a forum for regular political exchanges between member governments.[21] The new body was known as the Council Deputies, composed of 12 deputies each representing his foreign minister, with advisers and staff as necessary. The deputies were instructed to meet in continuous session in London.

28.49 The foreign ministers' deputies were usually senior diplomatic officers. But each deputy represented his country's national interest as a whole, including the particular interests of defence and finance ministries. Thus, the deputies grew into being not only 'representative' in a conventional, limited sense, but also the machinery of the government of an important international alliance albeit one where each member government retained its political sovereignty and NATO decisions continued to be taken by unanimity.

Finance and collective defence

28.50 In 1952 the Council decided that instead of being a periodic ministerial meeting, the Council should become a permanent body, entitled the North Atlantic Council and located in Paris. To enable the new Council to act in the absence of some, or indeed all, of the ministers, each minister would appoint a permanent (resident) representative. The chairman would be an international civil servant who, in addition to being vice-chairman of the ministerial Council, would also serve as secretary-general of the North Atlantic Treaty Organization. The proposals were approved, and Lord Ismay (United Kingdom) was appointed the first secretary-general.[22]

28.51 It is not possible in this book to follow, even in brief detail, the events and developments affecting so large and many-sided an organization as NATO. But a few landmarks stand out. In May 1956 the Council appointed a Committee to advise on closer cooperation in non-military matters. It consisted of Dr Gaetano Martino (Italy), Mr Halvard Lange (Norway), and Mr Lester Pearson (Canada),

20 General Eisenhower applied for release in 1952 to enter political life.

21 *Nato Facts and Figures,* 28.

22 The current secretary-general is Jaap de Hoop Scheffer (2004–) whose predecessors have been: Lord Robertson (1999–2003), Javier Solana (1995–9), Willy Claes (1994–5), Manfred Wörner (1988–94), Lord Carrington (1984–8), Joseph Luns (1971–84), Manlio Brosio (1964–71), Dirk U Stikker (1961–4), Paul Henri Spaak (1957–61), and Lord Ismay (1952–7).

each at one time or other prime minister of his country, who became known as 'The Three Wise Men'. Working amid the anxieties of 1956, the year of the failure of the Hungarian uprising and of the Anglo-French enterprise in Suez, the group laid the greatest emphasis on the necessity of cooperation at all times between the members of an alliance, lest the habit of cooperation falter when the need was greatest. In a notable document of 103 paragraphs, they wrote, 'events have reinforced the Committee's conviction that the Atlantic Community can develop greater unity only by working to achieve common policies on matters of common concern'.[23] The report suggested a number of ways in which day-to-day non-military cooperation might be extended. It was approved by the Council on 13 December 1956, and its effect proved lasting.

28.52 On 10 March 1966 President Charles de Gaulle announced that France intended to withdraw French personnel from the NATO integrated military headquarters, to terminate the assignment of French forces to the international commands, and to request the transfer from French territory of the NATO international headquarters and of Allied units and installations or bases not falling under the control of the French authorities. NATO, after a short period of uncertainty, showed its by now built-in strength, the Council taking note at its meeting at Brussels on 7 June that a number of the practical problems consequent on the French decision had been resolved, and accepted a warm invitation from the Belgian government to make Brussels the Council's headquarters.

Committees and commands

28.53 As has been evident from the above, NATO has been engaged throughout five decades in a process of structural experiment and adaptation. The principal change had been the formation of a Defence Planning Committee which was in practice the Council, meeting under the Defence Planning title and with that function. When in 1966 France remained in the Alliance but ceased taking part in NATO military discussions, a possibly serious difficulty was circumvented through the discussion of these items by the Council, meeting as its own Defence Planning Committee.

28.54 Although the US involvement in the Vietnam War created some tensions within the Alliance, the continuing threat from the Soviet Union and its allies in the Warsaw Pact ensured unity of purpose. Strategic arms limitation agreements

[23] *Report of the Committee of Three on Non-military Cooperation,* Ch 1, para 4. In the next paragraph the authors add the reminder to members of NATO that an attack on one is an attack on all. This Report is regarded in NATO as a turning point in the organization's development at which the members accepted that consultation on defence policies necessarily involves discussion of the whole content of world policy.

in the 1970s were not however sufficient to prevent a major build-up of Soviet arms in the late 1970s and early 1980s. NATO adopted a dual-track approach matching increased arms build-up of their own with a commitment to détente. The Soviet Union made strenuous efforts to divide the Alliance in the early to mid-1980s encouraging the mobilization of anti-nuclear weapons demonstrators in Alliance countries against the deployment in Western Europe of intermediate range nuclear weapons. But the Alliance stood firm and it was in the Warsaw Pact that cracks appeared as communism collapsed throughout Eastern Europe in 1989 leading to the reunification of Germany in 1990 and the dissolution of the Warsaw Pact and the Soviet Union in 1991. This led to existential questions in some quarters about the continuing purpose of NATO but, as hot war returned to Europe in the 1990s in former Yugoslavia for the first time since 1945, the question was clearly resolved in favour of NATO's continuing existence.

28.55 In the early post-Cold War period, NATO moved to build up relations with the former Warsaw Pact countries. The North Atlantic Cooperation Council established in 1991 sought to provide a framework for this activity. (It was subsumed into the Euro-Atlantic Partnership Council (EAPC) in 1997, an enhanced forum for security consultation and cooperation, comprising all 26 NATO member countries and 24 partners.) In 1993, NATO decided to offer former members of the Warsaw Pact an association with NATO known as Partnership for Peace (PfP). Those countries so associated with NATO take part in a specific menu of activities focusing in particular on defence-related work, defence reform, but which touch on virtually every field of NATO activity. These include defence policy and planning, civil-military relations, education and training, air defence, communications and information systems, crisis management, and civil emergency planning, joint exercises, peace-keeping operations, and information sharing. Members of PfP may apply for membership of NATO and be accepted, subject to meeting the criteria (to date, as of 2009, 10 PfP members have become full members of NATO: Hungary, Poland, and the Czech Republic in 1999 and Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovenia, and Slovakia in 2004). This process was facilitated by the decision of the NATO Summit meeting in Washington in April 1999 to create Membership Action Plans to assist individual countries aspiring to and judged ready to open negotiations for membership. A full list of current members of NATO is to be found at <http://www.nato.int>.

28.56 In 1995, France returned to the Military Committee of NATO after a 30-year absence. In the same year, NATO aircraft bombed Bosnian Serb positions to force the withdrawal of heavy artillery from around Sarajevo where the city had been effectively besieged for three years. This helped bring an end to the Bosnian war. The peace agreement concluded at Dayton, Ohio in November 1995 made provision for the deployment of NATO troops to enforce the peace agreement militarily.

The implementation force of up to 54,000 troops in country (known as IFOR) was succeeded by a smaller stabilization force known as SFOR the following year. It concluded its mission in December 2004 handing over to a 7,000-strong EU force known as EUFOR, the first full military deployment by the European Union under the European Security and Defence Policy (ESDP).

28.57 In Autumn 1988 NATO issued an ultimatum to President Milošević of the then Federal Republic of Yugoslavia (FRY) threatening the use of force unless attacks on the Albanian population in Kosovo stopped. There then followed negotiations in Rambouillet between representatives of the Federal Republic and the Kosovar Albanians, under the chairmanship of France and the United Kingdom, with the aim of agreeing substantial autonomy for Kosovo. A draft agreement was not accepted by the FRY. Accordingly on 24 March 1999, NATO began a campaign against the FRY in an effort to stop what was perceived as continued FRY action against the Kosovar Albanians, to encourage FRY acceptance of the international peace agreement, which had been rejected by Milošević's representatives at Rambouillet and which would have granted extensive autonomy to Kosovo, and to force the withdrawal of FRY troops and security forces from there. This action was taken without explicit UN Security Council authorization. Each member of NATO satisfied itself that it was acting legally in voting for military action invoking the need for humanitarian intervention. The arguments in favour included the need for a proportionate response to protect the Albanians, all other means having failed.

28.58 After 11 weeks of bombing which had extended to infrastructure targets in Serbia and as it began to look as though only the threat of an attack by ground forces would compel the FRY's surrender, the Yugoslav president, Slobodan Milošević agreed to NATO's demands after an intervention by two envoys on behalf of the international community, the former Finnish president Martti Ahtisaari and Mr Viktor Chernomyrdin the former Russian prime minister. The terms were incorporated into a UN Security Council resolution, SCR 1244. Under the terms of the SCR, Yugoslav troops withdrew and were replaced by a NATO-led force (KFOR) under a United Nations mandate, and a UN Mission assumed responsibility for the administration of Kosovo. The campaign demonstrated clearly the importance of maintaining Alliance cohesion during such a relatively extended campaign, both militarily and politically. Targeting was the responsibility of the NATO secretary-general and the Supreme Commander. This became a sensitive point as the French government insisted on generic approval of targets to the frustration of NATO military commanders and the irritation of the US government. This, NATO's largest military operation, was remarkable in being conducted despite the fact that no member of NATO had been attacked. Russia denounced the attacks and broke off all diplomatic links with NATO. They were resumed

in 2000. China was also incensed by the accidental bombing with fatalities of the Chinese embassy in Belgrade and NATO missions in Beijing were attacked by demonstrators.

28.59 In August–September 2001, the Alliance also mounted a mission to disarm ethnic Albanian militias in the Former Yugoslav Republic of Macedonia (FYROM) and, working with the European Union and the Organization for Security and Cooperation in Europe (OSCE), averted the risk of a civil war.

28.60 The 9/11 attacks on New York and Washington in 2001 prompted NATO to invoke Article 5 ('agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all') of the NATO Charter for the first time in its history. Despite this prompt demonstration of solidarity, the US chose not to involve NATO directly in its initial response against Al Qaeda and their Taleban protectors in Afghanistan. NATO did however take command of the International Security Assistance Force (ISAF) in Afghanistan in April 2003. The handover of control to NATO took place in August that year and marked the first time in NATO's history that it had taken charge of a mission outside the (North Atlantic) area. The troops, including those from 11 non-NATO countries, then numbered some 30,000.

28.61 At its summit in Bucharest in April 2008, NATO invited Croatia and Albania to apply for membership (they became members on 1 April 2009), and asserted that Ukraine and Georgia would become members of NATO. After a 43-year break, in March 2009, President Sarkozy announced that France would rejoin NATO's integrated military command.

28.62 Doubts about the relevance of NATO have been assuaged, not least by the number of countries who have joined and those who aspire to membership. It retains its primary responsibility for collective defence, is a forum for transatlantic debate, provides the means for a key expeditionary role to combat threats and promote stability, while on the European continent, it has encouraged reform of the security sector, democratic accountability, and cooperation between States. In moving forward, it also has a cooperative arrangement (known as Berlin Plus) with the European Union's European Security and Defence Policy, ESDP, under which for some operations, NATO can provide military assets and command structures for EU operations.

The Council of Europe

28.63 The Statute of the Council of Europe was signed in London on 5 May 1949. The original signatories were: Belgium, Denmark, France, Ireland, Italy, Luxembourg,

Netherlands, Norway, Sweden, and the United Kingdom. The current membership which greatly expanded after the fall of the Berlin Wall, and its consequences, stands at 47 Member States. That is, nearly every European country, with a combined population of about 800 million. The Council of Europe also has five observer countries: Canada, the Holy See, Japan, Mexico, and the US. It is important not to confuse the Council of Europe with the European Union (see Chapters **26** and **27**) or the European Council, the meeting of heads of state or government of the EU, although the EU shares unofficially the Council of Europe's flag and anthem. The Council of Europe's focus is on human rights, democracy, legal standards and the rule of law, and the promotion and extension of democracy and cultural cooperation. It effects its aims largely through Conventions (ie public international law) and unlike the EU the members do not transfer elements of their sovereignty to central institutions.

Principles and aim

28.64 The third paragraph of the Preamble to the Statute sets out the following principle:

'Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy . . .'. This precise wording turned out to be very important.

28.65 *Aim*. (Chapter I, Article 1) The aim of the Council of Europe, as set out in Article 1 of the Statute, is 'to achieve a greater unity between its members for the purposes of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'. This aim 'shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic and social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms'. Matters relating to national defence are specifically excluded from the Council's scope. Participation in the Council 'shall not affect the collaboration of its Members in the work of the United Nations and of other international organisations or unions to which they are parties'.

28.66 *Membership*. (Chapter II, Articles 2–9) Every member of the Council 'must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council. . .'. Membership is open under Article 4 to any European State 'which is deemed to be able and willing to fulfil' the preceding provisions and which is invited to accede by the Committee of Ministers.

28.67 *Structure.* (Chapter III, Articles 10–12) The organs of the Council are the Committee of Ministers, the Parliamentary Assembly of the Council of Europe (PACE), the Congress of Local and Regional Authorities of the Council of Europe, the European Court of Human Rights, and the secretary-general served by the Secretariat. There is also the Joint Committee, the organ of liaison between the Assembly and the ministers. The permanent seat of the Council is at Strasbourg.

28.68 *The Committee of Ministers* (Chapter IV, Articles 13–21) is the intergovernmental organ of the Council. Its members are the foreign ministers of Member States, who can, if necessary, be represented by an alternate, preferably of ministerial rank. The Committee deals with recommendations made by the Parliamentary Assembly, any other matters of general concern which it decides to place on the agenda, and with administrative and financial questions affecting the Council. It is the only organ of the Council empowered to take decisions. These may take the form of recommendations to member governments. The practice has been usual for decisions to be taken unanimously, although the Statute provides that certain decisions, including membership invitations, require a two-thirds majority and, in some cases, lesser majorities. Meetings of the Committee are held two to three times a year. The preliminary work is undertaken by a group of officials known as the Ministers' Deputies (ambassadors/permanent representatives of Member States) who also meet between sessions to discuss current matters. The Deputies are authorized to take decisions on behalf of the Committee of Ministers on all questions other than those involving important issues of policy.

28.69 The Committee of Ministers has, from time to time, set up Committees of Experts, composed of government officials, to examine the more technical recommendations of the Assembly and to discover what measure of intergovernmental agreement exists on the action to be taken on these recommendations.

28.70 *The Parliamentary Assembly*[24] (Chapter VI, Articles 22–35), which is the 'deliberative organ' of the Council, is composed of 318 representatives (and 318 substitutes) elected by national parliaments or appointed in such manner as the parliaments may decide. The number of seats allotted to each Member State in the Assembly is governed by the need to keep the size of the Assembly to reasonable proportions and at the same time to ensure that the smaller States are adequately represented.

[24] In July 1974 the Standing Committee decided that the name Parliamentary Assembly should be used instead of Consultative Assembly since it reflects the role and composition of the Assembly more accurately.

28.71 The Assembly holds four ordinary sessions each year, and there is a provision for the calling of extraordinary sessions. In furtherance of close relations between the two bodies, the Assembly holds an annual meeting with the European Parliament of the Communities on a subject of topical interest. The president and the six vice-presidents of the Assembly form the Bureau which directs the Assembly's work. The Assembly's views may be incorporated in resolutions or recommendations. The latter, which may propose specific action by member governments, come before the Committee of Ministers for consideration. Major decisions require a two-thirds majority.

28.72 The work of the Assembly between sessions is carried on by a group of committees of which the most important is the Standing Committee, consisting of the Bureau and the chairmen of the other committees. The Joint Committee was set up in 1951 by a decision of the Committee of Ministers. Its function is to discuss problems of interest to the Assembly and the Committee of Ministers, to coordinate the work of the Council as a whole and to resolve differences arising between the ministers and the Assembly. Its chairman is the president of the Assembly, and it is composed in principle of 12 members—seven from the Assembly and five from the Committee of Ministers. The Congress of Local and Regional Authorities of the Council established in 1994 includes political representatives from local and regional authorities of the Member States.

28.73 *Activities.* Over the years, the most valuable functions of the Council divided themselves into three distinct sections:

1. the proposal and submission to government of conventions;
2. the work done in collaboration with Specialized Agencies, particularly the International Labour Organization, culminating in the Social Charter; and
3. the 'tidying up' (harmonization) of items of legislation or administration in individual European countries which, while identical in general purpose, may differ in detail and can be more usefully discussed in conference than bilaterally.

28.74 The first Convention to be drawn up by the Council of Europe was the European Convention on Human Rights. On 10 December 1948, the General Assembly of the United Nations proclaimed the Universal Declaration of Human Rights. It was noted by international lawyers and others that this declaration contained no enforcement provision and was most unlikely to prove 'self-enforcing'. Referring back to the Congress of Europe held at The Hague in May 1948, which had proclaimed that '[a]n independent European Court should be created to which any member of the Council could refer cases in which it appeared that the Declaration of Rights had been violated . . .', the Council of Europe approved, after some extremely complex technical negotiations, the European Convention

on Human Rights. This entered into force on 3 September 1953. It provided for the creation of a European Court and this provision, combined with the wording of the Preamble to the Statute quoted in paragraph **28**.64, represented a far stronger instrument than had existed hitherto. A Commissioner for Human Rights elected by the Parliamentary Assembly was created in 1999.

28.75 Since the conclusion of this first Convention, over two hundred further Conventions on widely varied subjects, (social, professional, economic, and cultural) have passed successfully through the Council of Europe including a Convention on the Prevention of Terrorism. Recent examples include Conventions on Action against Trafficking in Human Beings and the Protection of Children against Sexual Exploitation and Sexual Abuse.

28.76 The main activities and agreements on social policy are the European Social Charter (signed 1964), the European Code of Social Security (signed 1968), and the European Convention on Social Security. The Charter seeks to improve social and economic rights of individuals generally, the Code to establish acceptable standards of social benefits and the European Convention on Social Security to solve social security problems raised by the movement of employees, tourists, etc across national frontiers. On cultural policy, one of the main agreements is the European Charter for Regional or Minority Languages.

28.77 In the matter generally described as 'harmonization' (point 3, paragraph **28**.73 above), the Parliamentary Assembly raises, largely through its 12 committees of members of parliaments, subjects of the greatest variety such as, to mention only very few, migrant workers, the European cultural heritage, the prevention of terrorism, and soil conservation. This kind of work will be found at all stages of development and can lead to anything from harmonization in purely practical terms to a formal Convention. The Committee of Ministers has, in its turn, rapporteur groups, working parties, and liaison committees to advise on propositions initiated by the Assembly.

28.78 It is clear from this brief analysis that the Council of Europe has found itself a purpose and method by which it can handle matters not covered by any other European organization. Much of it, while not attracting immediate public attention, has long-term value. It is bound at times to involve the European Union, with whose activities it may from time to time overlap (eg human rights, protection of personal data, extradition, mutual assistance in criminal matters, terrorism), and with whom its future technical and political relationships will continue to be both delicate and very important. In May 2007, the Council of Europe and the European Union signed a Memorandum of Understanding which sets out the priorities and focal areas of cooperation between the two organizations.

The Organization of American States (OAS)

28.79 The Organization of American States was formed in 1948, but efforts to establish some system of inter-American organization are as old as the independence of the Latin American republics. A Congress of American States, the first attempt of its kind, was convened by Simón Bolívar[25] at Panama in 1826 with the aim of creating an association of States in the hemisphere but was unsuccessful in laying down any permanent structures. In 1890, the First International Conference of American States was held in Washington DC and established the International Union of American Republics and its secretariat, the Commercial Bureau of the American Republics, the forerunner of the OAS. This organization became the Pan-American Union in 1910. When established, its seat was at Washington. It developed smoothly into the OAS when at its Ninth Conference in 1948 in Bogota the 21 participants signed the OAS Charter and the American Declaration of the Rights and Duties of Man, the first international expression of human rights principles.

28.80 Fundamental to the Western hemisphere idea is the so-called Monroe Doctrine,[26] which laid down that the United States should 'consider any attempt [on the part of the European Powers] to extend their system to any portion of this hemisphere as dangerous to our peace and safety'. Latin Americans have, however, been less inclined to regard this declaration as a guarantee of their independence than as the implied assertion of United States' hegemony in the Western hemisphere; which, given their concern to defend Latin America from potential US encroachment, goes a long way towards accounting for the slowness of some Latin American governments to oppose (under United States' persuasion) the challenge of the Axis Powers before and during the Second World War and that of the Communist powers after it.

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25 Simón Bolívar, called El Libertador, born at Caracas in Venezuela in 1783. After travelling in Europe and the USA he joined the independence movement in Venezuela in 1809 and commanded insurgent forces with varying success until he defeated the Spaniards in 1821 and became the first President of Colombia, later helping to bring both Ecuador and Peru to independence. He died in 1830.

26 President James Monroe embodied this doctrine, now universally known by his name, in a message (largely written by John Quincy Adams, Secretary of State and future President) to Congress on 2 December 1823. The so-called Roosevelt Corollary, enunciated by President Theodore Roosevelt in 1904, seemed to be an extension of the doctrine presaging claims by the USA to the right of intervention in the affairs of Latin American states. In 1923 Secretary of State Hughes formally stated that the US had no such intention, and in 1930 was published a memorandum previously prepared by Under-Secretary J Reuben Clark, stating that the Corollary was not justified by the terms of the Monroe Doctrine.

The Charter

28.81 The charter of the OAS needs only a brief summary here. It was last revised in 1993.

Chapter 1 of the Charter describes the organization as within the United Nations a regional agency. Article 2 sets out the OAS's purposes:

(a) To strengthen the peace and security of the continent;
(b) To promote and consolidate representative democracy, with due respect for the principle of non-intervention;
(c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States;
(d) To provide for common action on the part of those States in the event of aggression;
(e) To seek the solution of political, juridical, and economic problems that may arise among them;
(f) To promote, by cooperative action, their economic, social, and cultural development;
(g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and
(h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

Article 24 provides that 'international disputes between Member States shall be submitted to the peaceful procedures set forth in this Charter. This provision shall not be interpreted as an impairment of the rights and obligations of the Member States under Articles 34 and 35 of the Charter of the United Nations.'

28.82 Chapter 2 contains a reaffirmation of principles, including the effective exercise of representative democracy; respect for the rights of the individual 'without distinction as to race, nationality, creed or sex'; and condemnation of aggression, adding that 'victory does not give rights'—a phrase on which the Argentine representative laid particular stress. Chapter 3 deals with membership—about which more below—while Chapter 4 addresses the fundamental rights and duties of States.

28.83 The principle of non-intervention is reaffirmed in Article 19:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

And Article 21 reads:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognised.

28.84 *Membership* of the OAS in 2009 includes all 35 American States as follows: Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Cuba; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; Uruguay; Venezuela; United States; Trinidad and Tobago (1976); Barbados (1968); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (1979); Saint Lucia (1979); Antigua and Barbuda (1981); Saint Vincent and the Grenadines (1981); Bahamas (1982); Saint Kitts and Nevis (1984); Canada (1990); Belize (1991); Guyana (1991). Up–to-date membership details can be found at: <http://www.oas.org>.

28.85 The OAS has permanent resident representatives in 24 American States. In addition to the United Nations 60 countries and the EU have Permanent Observer status at the OAS.

28.86 The OAS secretary-general is entitled to attend the United Nations General Assembly as an Observer, and the United Nations has Observer status at all OAS inter-American conferences and meetings of consultation. Although there is no formal political cooperation between the OAS and the UN, organs of the OAS have adopted texts in support of UN actions (eg the Suez and Hungarian questions in 1956) and have from time to time reported to the UN secretary-general (in accordance with Article 54 of the UN Charter) on OAS decisions and on developments within the region.

Institutions of the OAS

28.87 The member countries set major policies and goals through the General Assembly, which gathers the hemisphere's ministers of foreign affairs once a year in regular session. Ongoing actions are guided by the Permanent Council, made up of ambassadors appointed by the Member States. A Meeting of Consultation of Ministers of Foreign Affairs is held in order to consider problems of an urgent nature and of common interest to the American States, and to serve as the Organ of Consultation. Any Member State may request that the Meeting of Consultation be called. The request must be addressed to the Permanent Council of the organization, which decides by an absolute majority whether a meeting should be held.

Another major institution is the Inter-American Council for Integral Development which promotes economic development and combats poverty. OAS

technical cooperation programmes address such areas as river basin management, the conservation of biodiversity, planning for global climate change, and natural disaster mitigation. Other institutions include:

The Inter-American Economic and Social Council
The Inter-American Council for Education, Science and Culture
The Inter-American Juridical Committee (which has its seat at Rio de Janeiro)
The Inter-American Commission on Human Rights
The General Secretariat
The Specialized Inter-American Conferences
The Specialized Organizations, namely the
  Inter-American Children's Institute
  Inter-American Commission of Women
  Inter-American Indian Institute
  Inter-American Institute of Agricultural Sciences
  Pan-American Health Organization
  Pan-American Institute of Geography and History.

These bodies have full technical autonomy, but take account of the recommendations of the General Assembly. They establish cooperative relations with world agencies of the same character in order to coordinate their activities.

28.88 For United States–Latin American relations the OAS has served as a framework for endeavours by each party to obtain its objectives. In the OAS's early years, the US was pushing an anti-Communist line aimed initially at Guatemala. Neither the non-interference principles of the OAS nor its peace-keeping machinery prevented the overthrow of the Arbenz regime in Guatemala in 1954 nor that of the Allende government in Chile in 1973, both CIA sponsored coups against democratically elected Marxist governments. In 1961 six of the most important Latin American States refused to vote for a Meeting of Consultation to consider what should be done about the violations of human rights and the subversive activities against his neighbours of which President Fidel Castro was accused. Nevertheless a meeting was eventually held in February 1962 at Punta del Este, where the Alliance for Progress[27] had been launched the previous year, at which 16 delegations supported a ban on military supplies to Castro, and 14 the exclusion (ie in practice the suspension) of the Cuban government from the OAS. There was, however, sharp disagreement regarding the juridical soundness of this exclusion as the terms of the Charter make no express provision for suspension.

[27] Established by the Charter of Punta del Este, under which $20 billion, largely from US governmental sources, would be made available over a period of 10 years for national development projects in Latin America.

Again, when the Cuban missile crisis arose in October 1962, President Kennedy appealed simultaneously to the Security Council and to the OAS. The latter adopted a resolution calling for the dismantling and withdrawal from Cuba of all missiles and sanctioning the use of armed force to ensure that the government of Cuba could not 'continue to receive from the Sino-Soviet powers military supplies and related material which may threaten the peace and security of the continent'. However, Mexico, Bolivia, and Brazil made it clear that they would not support armed invasion of Cuba to remove the missiles. Nor did the United States succeed in securing the removal of all Soviet forces from Cuba, still less the downfall of Fidel Castro. He has now been succeeded as president by his brother but Cuba remains suspended. Since the advent of the populist president of Venezuela, Hugo Chávez, in 1999, US relations with that country have almost matched in antipathy those with Cuba. The US government has claimed that Chávez and his policies are a threat to democracy in Latin America.

28.89 From the point of view of the Latin American States, on the other hand, these same episodes could be viewed as examples of how in the framework of the OAS it was possible to exert a restraining influence on the United States. In fact the Latin Americans have always shown reluctance to allow the OAS to be involved in military commitments of any kind. They see its virtue as a peace-keeping instrument; and as such it has proved its usefulness in several instances.

Recent developments

28.90 As the Cold War came to an end and as democratic regimes increasingly became the norm in Latin America, the OAS adjusted its priorities and its work programme to reflect the new realities. Thus the organization has worked increasingly to support and strengthen democratic institutions eg by adopting in 2001 the Inter-American Democratic Charter, which sets out key principles of democratic practice and guidelines for action when democracy is considered to be at risk in the region; and by sending a large number of observer missions to monitor free and fair elections in the Member States and investigating irregularities. Special OAS missions have helped to resolve political crises in Bolivia, Ecuador, Haiti, Nicaragua, and Venezuela, and to support the demobilization of paramilitary groups in Colombia. The OAS has also played an important 'facilitator' role in the long-running border dispute between Belize and Guatemala. Both the Inter-American Human Rights Commission (set up in 1959) which has been increasingly active in reporting on the human rights situations in Member States and in denouncing individual human rights violations, and the Inter-American Court of Human Rights (created in 1979) are well-established, active, and highly regarded. These bodies carry out serious scrutiny of national laws and illegal practices, such as the systematic elimination of political opponents through

forced disappearances. The Inter-American Drug Abuse Control Commission was established in 1986 to coordinate efforts and facilitate cross-border cooperation.

28.91 The first Summit of the Americas took place in 1994 in Miami at President Clinton's initiative. Although it resolved to establish a hemispheric free trade area within 10 years, an ambitious goal that has not been achieved, the OAS has not recently been extensively active in the economic sphere. There have instead been partial solutions which have so far not proved complementary. Thus MERCOSUR (the Common Market of the South) currently groups only four countries: Brazil, Argentina, Paraguay, and Uruguay, with Venezuela set to join. MERCOSUR has made considerable progress in establishing a free trade in services but further progress in this area and on an Association Agreement with the European Union (under negotiation since 2000) has been hampered by the huge economic disparity between Brazil and the other members (Brazil has over 80 per cent of the GDP of MERCOSUR) and by Brazil's priority accorded to liberalization of agricultural trade given its relative efficiency. The North American Free Trade Agreement (NAFTA) comprises only the US, Canada, and Mexico. Since the Miami summit, the heads of state and government of the Americas have decided to meet on a regular basis and to institutionalize the Summit meetings. This institutionalization had been lacking during the Cold War Summits which were organized on an ad hoc basis. The most recent Summit (the fifth) took place in Port of Spain in 2009.

African Union (AU) formerly the Organization of African Unity (OAU)

28.92 The Organization of African Unity was established in 1963. By 1977, there were 49 members of the OAU. Of these, only two, Egypt and Liberia, were original members of the United Nations when it was formed in 1945.[28] This expresses the fundamental difference between the OAU and the other international regional organizations considered in this chapter. The vast majority of those who by then occupied places of power in these countries had a living memory of being governed, at least down to middle level, by people of a different race and nationality. This was bound to give a special perspective to those seeking both national independence and the strengthening of that independence through

[28] It is fair to recall that Ethiopia had retained its independence until its conquest by Italy under Mussolini in 1935. This, together with the survival in exile of the Emperor Haile Selassie, gave Ethiopia a good claim to be the headquarters of the eventual OAU.

continental unity. The OAU Charter dedicated the organization to eradicating all forms of colonialism from Africa.

28.93 Except for the overrunning of the North (and parts of West Africa as far south as Northern Nigeria) in the eighth century by the Muslims, external conquest came to Africa relatively late; principally from Britain, France, but also the Netherlands, Belgium, Portugal, and others, and there was no development parallel to that in the Americas, where the original British and other settlers in the United States converted themselves through the Monroe Doctrine into the guardians of a continent against outside interference. European power in Africa was historically short-lived and although it survived two world wars in which some European countries had colonies in Africa who fought on opposite sides, it continued for another 15 years until the first wave of decolonization in the 1960s without causing the colonial structure in Africa to collapse.

28.94 Some pressures for independence existed before the Second World War—historic American disapproval of colonies, contact of African students in Europe and the United States with libertarian doctrines, teaching, and practice, the weaknesses inherent in Britain's indirect rule, African troops fighting overseas against the Axis Powers in the cause of freedom, followed after the Second World War by the many invitations extended by the Soviet government to African students to study in Moscow. But perhaps the most telling influence on African hopes was the success of the Indian sub-continent and Ceylon (Sri Lanka) in 1947 in gaining independence from Britain.

28.95 Ten years after the Second World War the first sub-Saharan African State, Ghana (previously the Gold Coast), became independent.[29] The first president, Dr Kwame Nkrumah's dynamic radicalism had two positive effects: it provided African radicals with a persuasive theoretician and it enabled him through his friendship with other African radicals like M. Sekou Touré of (French) Guinea to create a bridge between English-speaking and French-speaking Africa which would be essential to any future organization claiming to represent Africa as a whole. On the other hand, his very radical line aroused suspicions in Muslim North Africa and other countries whose participation was essential to success.

28.96 An era of conferences and drafting of charters now began.[30] In 1958, Ghana and Guinea, joined later by Mali, adopted a Charter which was intended to form the

[29] Apart, of course, from South Africa.

[30] For the historian of the development of the idea of African unity, the lists of attendances at these conferences are of very special interest. They suggest a study, as it were, in two depths, (1) the general growth of the idea and (2) variations of thinking and of régime in each of the individual countries.

basis of a Union of African States. Arising from this initiative, a conference was held at Casablanca in January 1961 attended by the heads of state of Ghana, Guinea, Mali, Morocco, and representatives of Libya and the Provisional Government of the Algerian Republic (GPRA); it adopted an African Charter and decided to set up an African Command and an African Common Market. However, a number of States from the same general area had declined the invitation to Casablanca, and in June 1961 a conference of 19 States was held at Monrovia, capital of Liberia. The majority of those attending came from former French colonies, but the conference included two previously independent States, Ethiopia and Liberia, and two important former British West African colonies, Nigeria and Sierra Leone. At a further meeting in Lagos in January 1962, substantially the same group set up a Permanent Secretariat and a Standing Committee of Finance Ministers, and adopted a draft Charter for an Organisation of Inter-African and Malagasy States.

28.97 Meantime a third 'stream' of conferences had been held by French-speaking countries between October 1960 and March 1961 at Abidjan, Brazzaville, and Yaoundé, which led to the signing in September 1961 at Tananarive, the capital of Madagascar, of a Charter establishing the Union Africaine et Malgache (succeeded four years later by the Organisation Africaine et Malgache). Thus, in 1961 the moment had arrived when African countries had to decide whether division should continue or be overcome.

28.98 A preparatory conference was held at Addis Ababa at the beginning of May 1963 at which the foreign ministers of 30 African States met to discuss items of principle which would have to be covered by a Charter. Each of the three groupings was fully represented, each region of Africa, (except the Portuguese and Spanish colonies, which had not yet gained independence, and South Africa, Rhodesia, and Namibia) and each political trend. The heads of state met on 16 May and drew up a draft of a Charter for an Organization of African Unity which was signed on 26 May 1961 by the representatives of 31 States. The Charter represented a compromise between those who, like Ghana, favoured something as close as possible to federation, and those who insisted on as loose an association as was compatible with the word 'unity'. This tension was still evident 40 years later when, in July 2002, the AU was formed as a successor to the OAU and the African Economic Community (AEC). The OAU had been criticized as both ineffectual and insouciant of human rights abuses by the continent's own leaders giving it the unfortunate epithet of 'the Dictators' Club'. The Libyan head of state Muammar al-Gaddafi was a particularly strong advocate of the closer union approach from the mid-1990s. It was not unexpected then when the heads of state and government of the OAU issued the Sirte (in Libya) Declaration in September 1999, calling for the establishment of an African Union. At subsequent summits in Lomé in 2000 and Lusaka in 2001, detailed plans were elaborated

for the creation of the African Union which coincided with the initiative for the establishment of the New Partnership for Africa's Development (NEPAD).

28.99 The African Union was launched in Durban in July 2002, by its first president, the South African president Thabo Mbeki. In the following years, the debates within the OAU have been replicated within the AU with some countries (notably Libya) following a maximalist view leading to a common Union government with an AU army; and others (especially the southern African States) supporting rather a strengthening of the existing structures, with some reforms to deal with administrative and political challenges in making the AU Commission and other bodies truly effective.

The objectives of the AU **28**.100

- To achieve greater unity and solidarity between the African countries and the peoples of Africa.
- To defend the sovereignty, territorial integrity, and independence of its Member States.
- To accelerate the political and socio-economic integration of the continent.
- To promote and defend African common positions on issues of interest to the continent and its peoples.
- To encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.
- To promote peace, security, and stability on the continent.
- To promote democratic principles and institutions, popular participation, and good governance.
- To promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.
- To establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations.
- To promote sustainable development at the economic, social, and cultural levels as well as the integration of African economies.
- To promote cooperation in all fields of human activity to raise the living standards of African peoples.
- To coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.
- To advance the development of the continent by promoting research in all fields, in particular in science and technology.
- To work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

28.101 **The organs of the AU**

The Assembly

Composed of heads of state and government or their duly accredited representatives. The Assembly of Heads of State and Government is the supreme organ of the Union.

The Executive Council

Composed of ministers or authorities designated by the governments of Member States, the Executive Council is responsible to the Assembly.

The Commission

Composed of the chairperson, the deputy chairperson, eight commissioners and staff members; each commissioner shall be responsible for a portfolio.

The Permanent Representatives' Committee

Composed of permanent representatives of Member States accredited to the Union; the Permanent Representatives Committee is charged with the responsibility of preparing the work of the Executive Council.

Peace and Security Council (PSC)

By decision AHG/Dec 160 (xxxvii) of the Summit of Lusaka, July 2001, a decision was made for the creation within the African Union of the Peace and Security Council. The Protocol establishing the PSC is in the process of ratification.

Pan-African Parliament

A Pan-African Parliament and organ to ensure the full participation of African peoples in governance, development, and economic integration of the continent. The protocol relating to the composition, powers, functions, and organization of the Pan-African Parliament has been signed by Member States and is in the process of ratification.

ECOSOCC

The Economic, Social and Cultural Council, an advisory organ composed of different social and professional groups of the Member States of the Union. The statutes determining the functions, powers, composition, and organization of the Economic, Social and Cultural Council have been prepared and will be submitted to the Maputo Summit.

The Court of Justice

A Court of Justice of the Union shall be established. The statutes defining the composition and functions of the Court of Justice have been prepared and will be submitted to the Assembly in Maputo.

The Specialized Technical Committees

The following Specialized Technical Committees are meant to address sectoral issues and are at ministerial level:

The Committee on Rural Economy and Agricultural Matters;
The Committee on Monetary and Financial Affairs;
The Committee on Trade, Customs and Immigration Matters;
The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;
The Committee on Transport, Communications and Tourism;
The Committee on Health, Labour and Social Affairs; and
The Committee on Education, Culture and Human Resources.

The Financial Institutions

The African Central Bank
The African Monetary Fund
The African Investment Bank.

Membership of the AU

28.102 There are 53 Member States: Algeria; Angola; Benin; Botswana; Burkina Faso; Burundi; Cameroon; Cape Verde Islands; Central African Republic; Chad; Comoro Islands; Democratic Republic of the Congo; Congo; Djibouti; Egypt; Equatorial Guinea; Eritrea; Ethiopia; Gabon; The Gambia; Ghana; Guinea; Guinea-Bissau; Ivory Coast; Kenya; Lesotho; Liberia; Libya; Madagascar; Malawi; Mali; Mauritania; Mauritius; Mozambique; Namibia; Niger; Nigeria; Rwanda; Western Sahara (SADR); São Tomé and Principe; Senegal; Seychelles; Sierra Leone; Somalia; South Africa; Sudan; Swaziland; Tanzania; Togo; Tunisia; Uganda; Zambia; Zimbabwe. The only African State that is not a member of the African Union is Morocco. She left the AU's predecessor, the Organization of African Unity (OAU), in 1984, in protest at the support of many OAU Member States for the Polisario Front's Sahrawi Arab Democratic Republic (SADR). This is a government-in-exile (based in Algeria) of the former Spanish colony of Western Sahara, proclaimed by the Sahrawi rebel movement, the Polisario Front, after the colony was incorporated into Morocco and Mauritania after its cession by Spain in 1976.

Sanctions for human rights violations

28.103 The African Union does have provision for suspension of members in case of unconstitutional change of regime and has applied the provision to the Central African Republic, Togo, and recently to Mauritania and Guinea. In 2008 there was further discussion of strong action against Zimbabwe, with a number of

States supporting sanctions, and Kenya suggested suspension but received insufficient support. Instead the Council recommended that the two parties should negotiate to bridge their differences. Given its post-colonial history, it is perhaps unsurprising that within the AU there tends to be more emphasis on unconstitutional or undemocratic change than on intrusive monitoring of wider human rights performance. By contrast, in March 2009 the Tribunal of the Southern Africa Development Community delivered a judgment on the application by dispossessed land owners in Zimbabwe which declared that the seizures of land were 'arbitrary, discriminatory and contrary to the rule of law'. The Tribunal ordered protection for remaining land owners and compensation for those evicted, and further declared that the provision in the constitution of Zimbabwe denying access to the courts to those dispossessed by land reforms was contrary to the treaty of the Southern Africa Development Community.

Problems in meeting the objectives of the OAU and the AU

28.104 The Organization of African Unity set itself a most ambitious task of both policy and administration. The administrative problems were obvious, the sheer difficulty of adequate communication, interpretation, and consultation between nearly 50 nations inhabiting an enormous continent and its adjacent islands. The policy task was governed by two sets of tensions, those indigenous to Africa itself and those resulting from past and present encounters between Africa and the outside world. Some contained elements of both.

28.105 Confronted by these tensions, the OAU applied both conciliation and pressure. An important first step in conciliation was the acceptance by the organization in 1964 of a Protocol under which Member States would accept the boundaries set up in the colonial period. The acceptance proved far from complete in the days of the OAU. In Nigeria, a civil war broke out in 1967 over Biafra's attempt to secede. War broke out between Somalia and Ethiopia in 1977 over the Ogaden area; Libya had frontier claims against Chad and there have been interstate or internal wars over the last 20 years in Angola, Burundi, Democratic Republic of the Congo, Rwanda, Darfur (part of Sudan) and Ethiopia resulting in the creation of the State of Eritrea, Somalia, Sierra Leone, Ivory Coast, Comoros, and many more instances of internal turmoil such as Zimbabwe which has increasingly failed to deliver minimum standards of stability, health care, adequate food and water, or human rights. Several boundary disputes in Africa have gone to the ICJ (Chapter **30**). It has been estimated that over a quarter of the countries of the AU are engaged in war or are suffering post-war conflict. The AU's Peace and Security Council has since its first meeting in 2004 been active in relation to some current crises and has created AU peace-keeping forces which have been deployed in Burundi, Darfur, and Somalia. It is also

involved in the creation of a stand-by force to operate as a permanent peace-keeping body.

28.106 To these crises of conflict should be added the huge challenges posed by disease, notably HIV/AIDS (which is at least as much a security as a health issue) and malaria, climate change and desertification, and the aggravating pressures these are exerting on poverty in the world's poorest continent. The AU's ability to provide a contribution to the solution of these problems in collaboration with external actors such as the UN and the G8 will be the touchstone of its success not the institutional discussions over the creation of a Union government.

28.107 To pressures such as these, operating within the continent, there can be added one operating with some effect outside. There are (in 2009) no less than 53 Member States of the AU, all members of the United Nations. Such a group constitutes almost one third of the total United Nations membership. Apart from the mathematical effect on voting in the UN General Assembly, a voting bloc of this magnitude cannot fail to affect the general atmosphere there and the votes in Committee meetings in which African members may take a particular interest. These are changes which cannot be ignored despite the limitations on the Assembly's power.

28.108 As a result of the lessons of the last 30 years, the concept of unity among the peoples of Africa has grown at great speed, measured against the scale of world history. How rapidly this unity can be translated into yet further practice by so large a number of relatively newly independent States will depend partly on active understanding of Africa's problems by the international community and partly on the skill shown in resolving outstanding differences, in particular those which, if they persist or recur, could inhibit urgently needed economic growth.

Association of South-East Asian Nations (ASEAN)

28.109 The reasons for the formation of ASEAN in 1967 were a complete contrast to those which lay behind the founding of the Organization of African States. Whereas in Africa there was a clear political objective to bring independence to all African countries that had not yet achieved it, and to remove racial discrimination from the African continent, the position in Asia in the mid-1960s was much more complex. First there were a number of States either at war or at least in sharp conflict with each other, notably the two Vietnams and the two Koreas. There was also the confrontation between Malaysia, supported by the United Kingdom, and Indonesia. In addition, the activities of Communist dissidents were a continuing problem for countries such as Thailand and the Philippines, and even to some extent Malaysia (although the Emergency had

officially ended in 1960): these countries therefore sought the reassurance of continued links with the West. Thailand and the Philippines were members of SEATO (designed to be a South East Asian version of NATO and dissolved in 1977): Malaysia and Singapore had defence ties with Britain. At the same time they were also prey to the fear that too much reliance on the West would only serve to attract increased hostility from the Communist world. They therefore felt the need to group together in what was seen as the middle ground between the Communist and non-Communist worlds.

28.110 When the United States, from acting as adviser to the South Vietnamese government and armed forces, decided early in 1965 to become more directly involved by sending regular units in support of South Vietnam the desire of the South-East Asian non-Communist States to stay out of trouble was further emphasized, despite the degree of active support which both Thailand and the Philippines, as US allies, gave to the American war effort in Vietnam.

28.111 Although there was a gradual trend toward the formation of an organized 'middle' group in South-East Asia, its achievement might have been delayed for a considerable time, had it not been for two important developments. During 1965, fears grew in Indonesia, particularly among military leaders, that President Sukarno might press his policies of friendliness to the Communist Party at home and to Communist States abroad to the point that Indonesia would become wholly committed to the 'Communist Camp'. On 30 September of that year an attempted coup by left-wing groups, including the leaders of the Communist Party, was thwarted by the Army. President Sukarno, whose attitude to the coup had been equivocal, subsequently fell from power and was succeeded by a military regime under the leadership of General Suharto. The new government was anti-Communist in sentiment and sought improvement of relations with non-Communist countries, and the cessation of confrontation with Malaysia and Britain. Indonesia thus became one of the 'middle' countries of the area whose location, size, population, and resources made its membership essential if any effective South-East Asian Organization independent of outside alliances were to be formed.

28.112 The second important development was that, between the end of 1965 and the beginning of 1967, a number of efforts to find a solution for hostilities in Vietnam failed, and thus any hope that the area might settle down in the atmosphere of a truce and render an independent South-East Asian political grouping unnecessary collapsed. This tended to accelerate the feeling among the non-Communist countries that closer cooperation would benefit their interests.

28.113 The first attempt at a regional grouping dates from 1961 when the Association of South-East Asia (ASA) was formed by Malaya, Thailand, and the Philippines.

Two years later MAPHILINDO was formed by Malaya, the Philippines, and Indonesia. Neither of these organizations was effective, largely owing to disputes between the members over the formation of Malaysia in 1963. Eventually, with confrontation over, the way was clear for regional cooperation between all these States and on 8 August 1967 a meeting of political representatives of Indonesia, Malaysia, the Philippines, Singapore,[31] and Thailand issued in Bangkok an announcement under the title 'ASEAN Declaration'. This document set out the aims and purposes of the Association as:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian nations;
2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;
5. To collaborate more effectively for the greater utilisation of their agriculture and industries, the expansion of their trade including the study of the problems of international commodity trade the improvement of their transportation and communication facilities and the raising of the living standards of their peoples;
6. To promote South-East Asian studies;
7. To maintain close and beneficial cooperation with existing international and regional organisations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.

As part of the Declaration, the ministers agreed upon the following: **28**.114

(a) An Annual Meeting of Foreign Ministers which shall be by rotation and shall be referred to as ASEAN Ministerial Meeting. Special meetings of Foreign Ministers may be convened as required . . .

(b) A Standing Committee under the Chairmanship of the Foreign Minister of the host country or his representative and having as its members the accredited Ambassadors of the other member countries, to carry on the work of the Association in between meetings of Foreign Ministers.

[31] The amalgamation of Malaya and Singapore as Malaysia had not worked satisfactorily, and the two states were separate again by August 1965. The name Malaysia was, however, retained by the former Malaya as a better designation for a state which included as well as Malaya the states of Sarawak and Sabah (former North Borneo).

(c) A National Secretariat in each member country to carry out the work of the Association on behalf of that country and to service the Annual or Special Meetings of Foreign Ministers, the Standing Committee and such other committees as may hereafter be established.

28.115 Sub-paragraph (c) above should be particularly noted because the setting up of a 'National Secretariat' in each member country meant the rejection, at least for the time being, of the idea of a central secretariat and therefore of central management. One of the results of this cautious decision and of the separation of the different subjects to be handled by the different members of the organization, was that in the immediately succeeding years a great proportion of the work done was confined to the completion of a detailed structure for the organization, but in 1973 the ASEAN Ministerial Meeting decided that there should be a permanent centralized secretariat located in Jakarta. With the establishment of the EEC/ASEAN Joint Study Group in 1975, ASEAN, in a collective diplomatic move towards the outside world, undertook discussion with the then European Economic Community. The next year, the ministers took diplomatic steps to formalize the corporate status and purposes of the Association. On 24 February at a summit meeting in Indonesia, held at Den Pasar in Bali, the representatives of the five Member States signed three important agreements:

(a) a Treaty of Amity and Cooperation in South-East Asia;
(b) a Declaration of ASEAN Concord;
(c) an agreement on the establishment of an ASEAN secretariat.

28.116 Much of the wording of the Declaration and the Treaty of Amity and Cooperation reiterates and amplifies the purposes and aims adopted in the 1967 Bangkok Declaration. But there were also significant additions. For instance, in the fourth sentence of the Preamble of the Declaration, the signatories: '[u]ndertake to consolidate the achievement of ASEAN and expand ASEAN cooperation in the economic, social, cultural and political fields'. The last item mentioned is new and significant. In paragraph 1 of the Declaration itself, the members define the first item of their principles as the pursuit of political stability:

> The stability of each member state and of the ASEAN region is an essential contribution to international peace and security. Each member state resolves to eliminate threats posed by subversion to its stability, thus strengthening national and ASEAN resilience.

Another important political point was the call for the establishment of a Zone of Peace, Freedom and Neutrality (ZOPFAN) in South-East Asia, thus transferring to the ASEAN level an initiative made originally by Malaysia in 1971. The economic development aspects were stated with more vigour and precision than in the previous Declaration, while the Treaty of Amity and Cooperation affirmed the objective of regional peace and, no doubt with the United Nations Charter in mind, contained a chapter (IV) entitled 'Pacific Settlement of

Disputes'. At this Conference the ministers also appointed the first ASEAN secretary-general, a special adviser on Indo-Chinese affairs to the foreign minister of Indonesia.

28.117 The ASEAN Vision 2020, adopted by the ASEAN Leaders on the 30th Anniversary of ASEAN in 1997, agreed on a shared vision of ASEAN as a concert of South-East Asian nations, living in peace, stability and prosperity, cooperating in economic development and in fostering a community of inclusive societies. In 2003, the ASEAN Leaders resolved that an ASEAN Community should be established comprising three pillars, namely, an ASEAN Security Community, an Economic Community, and a Socio-Cultural Community.

28.118 In recognition of security interdependence in the Asia-Pacific region, ASEAN had already established regional dialogue through the ASEAN Regional Forum (ARF) in 1994. The ARF's agenda is a three-stage one, namely the promotion of confidence-building, development of preventive diplomacy, and elaboration of approaches to conflicts. The present participants in the ARF include: Australia, Brunei Darussalam, Cambodia, Canada, China, East Timor, European Union, India, Indonesia, Japan, Democratic People's Republic of Korea, Republic of Korea (ROK), Lao PDR, Malaysia, Mongolia, Burma/Myanmar, New Zealand, Pakistan, Papua New Guinea, the Philippines, the Russian Federation, Singapore, Thailand, the United States, and Vietnam. The ARF discusses major regional security issues in the region, including the relationship amongst the major powers, non-proliferation, counter-terrorism, transnational crime, South China Sea, and the Korean Peninsula, among others.

28.119 The ASEAN Economic Community has as its end-goal economic integration measures to create a stable, prosperous, and highly competitive ASEAN economic region with a free flow of goods, services, investment, and a freer flow of capital, equitable economic development, and reduced poverty and socio-economic disparities by the year 2020. In aiming at this ambitious target the Economic Community is building on the ASEAN Free Trade Area (AFTA) launched in 1992. This aimed to promote the region's competitive advantage as a single production unit. The elimination of tariff and non-tariff barriers among member countries is being progressively introduced to promote greater economic efficiency, productivity, and competitiveness.

28.120 The ASEAN Socio-Cultural Community, again taking its cue from ASEAN Vision 2020, envisages a South-East Asia enjoying a partnership as a community of inclusive societies founded on a common regional identity. The Community fosters cooperation in social development aimed at raising the standard of living of disadvantaged groups and the rural population, and aims to involve all sectors of society, in particular women, youth, and local communities.

28.121 ASEAN holds annual summits during which meetings are held with China, Japan and South Korea (the ASEAN Plus Three grouping) and with Australia and New Zealand (ASEAN-CER). ASEAN is also a prime mover in ASEM, an Asia-Europe meeting of 45 members. There is also an ASEAN-Russia summit. An ASEAN-EU summit was held in 2007.

28.122 At their summit in November 2007, ASEAN endorsed the ASEAN Charter. The Charter gives ASEAN legal personality, and will develop the concept of the three core 'ASEAN Communities'. The aim of the Charter is to move ASEAN further towards integration and to strengthen ASEAN so that it can remain the driving force in the South-East Asian region. The ASEAN Charter provides for the establishment of a human rights body, which will 'operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers'. With no timeframes for when the terms of reference will be established, the charter gives little beyond a commitment to establish a body. The Charter was ratified, by all 10 members, in December 2008 and entered into force, at which point ASEAN became an international governmental organization with full legal personality.

28.123 While ASEAN has expanded geographically, institutionally, and in scope there is a general feeling in the West that the overriding principles of ASEAN which are very much geared to non-use of force, non-interference, and consensus has prevented the organization playing a robust role in dealing with the totalitarian regime in Myanmar (Burma) and other regional instances of human rights abuses. This may seem harsh as it also sees itself as a strategic actor aiming to promote regional stability. And while its favourite modus operandi is the so-called 'ASEAN way' of quiet diplomacy, compromise, and consensus-building, it has not shrunk from speaking out on occasions even against fellow members and other regional powers. ASEAN was robust in criticizing Vietnam after its invasion of Cambodia in 1978 and more recently in 2007 when the regime in Myanmar (Burma) crushed the protests against it led by monks and pro-democracy groups, ASEAN issued a strongly critical statement expressing its 'revulsion' at the use of such force. The following year after Cyclone Nargis had devastated Myanmar (Burma) leaving more than a hundred thousand dead and missing and many times that number homeless, ASEAN asked the regime what ASEAN meant to it when the Myanmar authorities initially refused to allow any foreign humanitarian relief workers to enter the country. Nevertheless it is also true that the ASEAN human rights body (see above) is likely to focus more on declarations and promoting human rights awareness than on rigorous enforcement.[32] The Singaporean

[32] See D McGoldrick and D Seah, 'I. The ASEAN Charter' (2009) 58 *ICLQ*,197–212 doi:10.1017/S0020589308000882.

foreign minister in 2008 commented on the body that 'while lacking in teeth, [it] will at least have a tongue, and a tongue will have its uses'.[33]

Membership

28.124 Membership has expanded from the original five (Indonesia, Philippines, Malaysia, Singapore, and Thailand) to 10 with the addition of Brunei in 1984, Vietnam in 1995, Laos and Myanmar (Burma) in 1997, and Cambodia in 1999. Enlargement of ASEAN's membership to include all South-East Asian nations in the late 1990s was a major advance for ASEAN. As well as fulfilling ASEAN's mandate geographically (except for East Timor, which may join in future), the accession of the Indochinese countries marked the final end of South-East Asia's ideological division (significant, given ASEAN's founding rationale as an anti-communist grouping). However, enlargement has also brought new challenges for ASEAN. Economically, ASEAN is more sharply divided between developed and developing countries, which complicates integration and block trade negotiations. As noted above, politically, Myanmar (Burma) has been an albatross around ASEAN's neck since it was admitted to membership. Further details on ASEAN can be found at <http://www.aseansec.org>.

Commonwealth of Independent States (CIS)

28.125 In December 1991—after the collapse of the Soviet Union—Russia, Belarus, and Ukraine founded a Commonwealth of Independent States. They were joined later the same month by eight other former Soviet republics: Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan, and Uzbekistan. One more former Soviet republic, Georgia, joined two years later while the three Baltic States declined to join making clear that their priority was to become members of the EU. (They joined in 2004.) Ukraine, Georgia, and Moldova have harboured ambitions in that direction. After the armed conflict between Russia and Georgia over South Ossetia in August 2008, Georgia has served notice of its intention to withdraw from the CIS. Turkmenistan became an associate member in 2005. The long or even the medium-term viability of the CIS is in doubt as many of its members have publicly expressed their doubts about its efficacy and two of its members, Georgia and Russia, have actually been in armed conflict. Its headquarters are in the Belarus capital while its chairman, the Executive Secretary, has been either from Russia or Belarus since its inception. Ukraine has never ratified the CIS Treaty and is not

[33] Singapore Parliamentary Reports, Vol 84 (28 February 2008).

therefore formally a member. Among the CIS's more concrete achievements have been the creation of a free trade zone (set up in 2005) and participation *qua* CIS in UN peacekeeping. Its participation in election monitoring in each other's Member States has often been highly controversial favouring pro-Russian parties.

Francophonie

28.126 With 55 Member States and governments and 13 observer States, the Organisation Internationale de la Francophonie claims over 200 million adherents. A full list of members and observers can be found at <http://www.francophonie.org>.

28.127 Many of the members are former French colonies but the criterion of membership is a significant presence of the French language and culture in the make-up of the Member State. The organization's headquarters are in Paris. Summits are held every two years, the most recent in the Canadian province of Quebec in 2008. While the main aim of the organization is self-evidently promotion of the French language, the organization's stated aims include promoting peace, democracy, and human rights; support for education and research; and sustainable development and interdependence.

Arab League

28.128 An important organization which can be termed regional, but is not wholly parallel with regional associations analysed in this chapter, is the Arab League. The idea of such a league came in 1942 from the British who saw it as a means to unite the Arab countries against Germany and Italy in the Second World War. It was eventually founded in 1945 at a time when its focus was on decolonization of Arab countries and the prevention of the creation of a State of Israel. It is currently an association of 22 Arab States plus the PLO with a population of around 300 million. It has a Council, Specialized Committees and Agencies and a secretariat administered by a secretary-general resident in Cairo. Between 1979 and 2006 the secretariat moved to Tunis in response to Egypt's signature of a peace treaty with Israel. The current secretary-general is the former Egyptian foreign minister, Amr Moussa.

28.129 While the Arab League is an intergovernmental organization, the emphasis of its work differs from that of other regional associations in that it consists less in the day-to-day handling of intergovernmental business than in the organizing of

conferences, largely on economic and social questions, cultural exchanges and investment protection, and particularly in the handling of the Arab case in the Middle East through speeches, publications, and personal contacts. Part of the reason for this lies in the divisions which have long been present in the organization initially between those countries more aligned with the Soviet Union and its allies and those more oriented towards the West. More recently the divisions have been between the traditional monarchies and the more radical republics which in turn are mirrored in their degree of hostility to Israel. This has been illustrated in the reactions to the war in Iraq where some of the traditional Arab League States provided logistic and other support for the US-led invasion while others were fiercely hostile. The League's most striking success as an organization was its successful economic boycott of Israel between the creation of that State in 1948 and 1993. The League has a resident observer at the United Nations. Representatives with ambassadorial status are posted at a number of capitals. The League also concerns itself with the maintenance of the Islamic faith (but see the OIC below).

Organization of the Islamic Conference (OIC)

28.130 The Organization of the Islamic Conference is second only to the UN in numbers of members. There are currently 57 in four continents representing some 1.5 billion Muslims. A full list of members can be found at <http://www.oic-oci.org>.

28.131 The OIC was founded with 30 members in 1969 as a reaction to the arson attack on the Al Aqsa mosque in Jerusalem. In 1970 the first ever meeting of the Islamic Conference of Foreign Ministers (ICFM) was held in Jeddah which decided to establish a permanent secretariat there headed by the organization's secretary-general. It describes itself as the collective voice of the Muslim world aiming to safeguard and protect the interests of that world. The Islamic Summit, composed of kings and heads of state and government of Member States, is the supreme authority of the organization. It convenes once every three years to deliberate, take policy decisions, and provide guidance on all issues relating to the realization of its objectives and consider other issues of concern to the Member States and the Muslim world, the *ummah*.

28.132 The Council of Foreign Ministers, which meets once a year, considers the means for the implementation of the general policy of the organization by, inter alia:

(a) adopting decisions and resolutions on matters of common interest in the implementation of the objectives and the general policy of the organization;
(b) Reviewing progress of the implementation of the decisions and resolutions adopted at the previous summits and Councils of Foreign Ministers.

28.133 The General Secretariat is the executive organ of the organization, entrusted with the implementation of the decisions of the two preceding bodies. So far 11 Islamic Summit Conferences and 35 Councils of Foreign Ministers (CFM) have been held. The Eleventh Islamic Summit Conference was held in Dakar in March 2008.

28.134 The OIC has been criticized for its passivity and its failure to react promptly and forcibly to events of concern to the *ummah*. On the other hand it has been criticized vigorously by non-Muslim States with Muslim minorities (eg Thailand and India) for what have been perceived as unwarranted interference and failure to take a balanced view between Muslims and non-Muslims.

Organization for Security and Co-operation in Europe (OSCE)

28.135 With 56 States from Europe, Central Asia and North America, the Organization for Security and Co-operation in Europe (OSCE) is the largest regional security organization in the world. A list of current members can be found at <http://www.osce.org>.

28.136 Its origins go back to the period of détente in the Cold War in the early 1970s, when the Conference on Security and Co-operation in Europe (CSCE) was established as a forum for dialogue and negotiation between East and West. After two years of negotiations in Helsinki and Geneva, the CSCE reached agreement on the Helsinki Final Act, which was signed on 1 August 1975. This document contained a number of key political commitments on politico-military, economic, and human rights issues that became central to the so-called 'Helsinki process'. It also established 10 fundamental principles (the 'Decalogue') governing the behaviour of States towards their citizens, as well as towards each other.

28.137 Until 1990, the CSCE organized itself principally around a programme of meetings and conferences which developed and monitored the commitments which the Member States had assumed. However, with the end of the Cold War, the Paris Summit of November 1990 marked a step change in the CSCE's activities. The Summit issued a Charter of Paris for a New Europe in which the CSCE was given a key role to play in effecting the change in Europe and responding to the new challenges of the post-Cold War period. This involved inter alia the establishment of permanent institutions with a secretariat in Vienna and real operational capabilities. This process led at the Budapest Summit of Heads of State or Government in December 1994 to the 'Conference' name being changed to 'Organization' hence the OSCE.

28.138 The OSCE provides an early warning system for potential crises, and is actively involved in conflict prevention, crisis management, and post-conflict rehabilitation in its area. It has 19 missions or field operations in South-Eastern Europe, Eastern Europe, the Caucasus, and Central Asia.

28.139 Like its predecessor, the organization deals with three areas of security—the politico-military, the economic and environmental, and human rights. It therefore concerns itself with a wide range of activities, including arms control, confidence-building measures, human rights, minorities questions, policing and counter-terrorism, promotion of democracy (and specifically election monitoring), and the security aspects of economic and environmental activities. As all 56 participating States have equal status, decisions are taken by consensus. The OSCE retains relations with a number of partner States in the Mediterranean and Asia.

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Book VII

THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES AND THE DEVELOPMENT AND ROLE OF INTERNATIONAL CRIMINAL TRIBUNALS

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29

PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES[1]

Direct Negotiation and Consultation between the Parties	29.6	**Arbitration**	29.16
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Mediation and Good Offices	29.12	**Regional and Other Special Arrangements**	29.20
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29.1 There is little new in disputes between States—in some ways, they are as inevitable as disputes between individuals. Here we will concentrate on disputes between States while recognizing that many 'international' disputes may not involve States as parties.[2] Disputes have varied subject matter and need not concern political matters; they may, for example, be commercial in nature. A dispute is a specific disagreement relating to rights or interests where a party considers that it has a claim against another which that other rejects. The *Mavrommatis* case[3] defined a dispute as 'a disagreement over a point of law or fact, a conflict of legal views or interests between two persons'.

29.2 Among early efforts to settle disputes, prominent was the 1899 Hague Convention for the Pacific Settlement of International Disputes, followed by further efforts in 1907 to provide for a number of mechanisms which might be deployed.[4]

[1] For further reading, see J G Merills, *International Dispute Settlement* (4th edn, Cambridge: Cambridge University Press, 2005).

[2] For example international investment disputes between states on the one hand and individuals or companies on the other may, since the entry into force in 1966 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, be submitted to independent conciliation commissions and arbitral tribunals constituted in each case under the framework laid down by the Convention.

[3] PCIJ, Series A, No 2 (1924) 11.

[4] 1907 Hague Convention for the Pacific Settlement of International Disputes.

The options available permitted parties to agree on the process which they considered most likely to produce a satisfactory outcome. Any reference to any form of judicial and binding process required the prior agreement of the parties.

29.3 Resolution of disputes became a central tenet of the Charter of the United Nations. Article 1.1 sets out a primary purpose 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'. Article 2.3 requires that '[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered'. In Chapter VI on Pacific Settlement of Disputes, Article 33 sets out a possible menu through which the parties to a threat which may endanger the maintenance of international peace and security shall first of all seek a solution 'by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.

29.4 The United Nations has devoted much, if not always efficient, consideration to this issue. The General Assembly on 15 November 1982 approved the Manila Declaration on the Peaceful Settlement of International Disputes.[5] This drew on the Charter provisions to underline the need for the UN to increase its effectiveness in this area. All States were enjoined to settle disputes exclusively by peaceful means on the basis of sovereign equality of States and on the basis of free choice as to means; the resolution elaborated on the different ways of settling disputes. States Parties to regional arrangements were asked to make every effort to find a solution through those arrangements. Continuing effort is the order of the day, with the prospect of a reference to the Security Council if a threat to international peace and security emerges. In practice, such references have been few, partly because of sovereignty concerns, and partly resentment of the Council by those who hanker for a General Assembly role. Despite the demand and potential powers available to it, the United Nations has not responded sufficiently well to the challenge, particularly where disputes have their origin within a Member State. Nor have the resources and mediation support capacities been adequate to the demand, or enough been done to work with regional organizations and civil society.

29.5 The methods and techniques available to help resolve international disputes are similar, within and without the United Nations context. We will now summarize them in turn.

[5] GA resolution 37/10 of 15 November 1982.

Direct Negotiation and Consultation between the Parties

29.6 This is the most common means of settlement and involves the conduct of direct talks between the parties to a dispute, aimed at resolving the dispute; negotiations are used at some stage of almost every dispute. They are often conducted through 'diplomatic channels', that is, through foreign offices or diplomatic representatives, the delegations often including or comprising representatives from different departments of government. If settlement of the dispute through these means fails, the negotiations may be raised to the level of heads of state or government. A precondition for success is that the parties should have the political will to work for agreement, and that where relevant, politics and public opinion in the States concerned permit the negotiations to proceed. This process is entirely in the hands of the parties and does not involve a third party. Negotiations are bilateral or multilateral depending on the number of parties involved.

29.7 If the subject matter of the dispute means that substantive settlement is very difficult, different techniques may be used to assist with the process. Agreement may be possible on procedures, rather than substance; for example the result of the negotiations may be agreement to submit the dispute to a third party for resolution. Or a 'without prejudice' clause may be agreed which allows the parties to discuss certain matters while leaving the most contentious alone; for example, the sovereignty 'umbrella' under which the United Kingdom and Argentina negotiated on Falkland Islands matters without raising the question of sovereignty.[6] This followed the precedent of the Antarctic Treaty 1959 which settles certain questions among the parties while 'freezing' the sovereignty claims of some of the parties, and the non-recognition of those claims by others.

29.8 Some treaties impose an obligation on parties to consult together before taking any other action, as in Article 283 of the UN Convention on the Law of the Sea; refusal by one party to take part in such consultations does not prevent the other party from resorting to another process. But there is no general duty to attempt settlement by negotiation and negotiations do not have to be exhausted before resort is made to another option. The means of settlement set out in Article 33 of the Charter are alternative. However, at least some exchanges between governments will be necessary before a difference of view can be called a dispute and it is only if there is a 'dispute' that the matter can be taken to the International Court of Justice (ICJ). Sometimes, bilateral treaties can include a formalized

[6] See 1989 Joint Statement in 29 *ILM* 1291.

negotiating process to settle disputes. An example is the permanent commission established as part of the Canada-US International Joint Commission.

Inquiry and Fact-finding

29.9 The aim, in terms used in the 1907 Hague Convention,[7] is '. . . to facilitate a solution of . . . disputes by elucidating the facts by means of an impartial and conscientious investigation'. Fact-finding is a process performed by all tribunals, but it can also be a means of settlement of disputes separate from other mechanisms. While it should not involve the application of rules of law if the dispute has its basis in fact, it may also contribute to a solution if the dispute has legal content. The resulting acceptance by both parties of established facts should help find solutions, and can contribute to a successful outcome by a range of methods. The General Assembly in 1991 defined fact-finding as 'any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security'.[8] Prior approval by the States concerned is usually required.

29.10 A commission of inquiry was established by the British and Danish governments following the Red Crusader incident in 1961. A British trawler of that name had been arrested by a Danish fisheries protection vessel by having two Danish crew members put on board; the trawler had in turn incapacitated the Danish officers and changed course. The Danish vessel fired on the fleeing trawler. The commission of inquiry found the facts which facilitated the settlement of the dispute, though it took nearly a year after the commission's report: the governments agreed mutually to waive their claims. The commission did in practice approach the role of an arbitration in that it made some legal rulings as well as finding the facts. A further example was the investigation by the UN Secretary-General in 1984 of the use of chemical weapons between Iran and Iraq.

29.11 The UN Compensation Commission was established by the Security Council in 1991 to consider claims against Iraq arising from its invasion of Kuwait.[9] It was described by the Secretary-General as having a fact-finding role in the settlement of claims by governments, companies, and organizations.[10] Claims for

[7] This followed from an earlier version of arrangements for inquiry commissions in the 1899 Hague Convention.

[8] Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security A/RES/46/59 of 9 December 1991.

[9] Established by Security Council resolution 687 (1991).

[10] Report of the UN Secretary-General, 2 May 1991 (S/22559) para 20.

compensation have been assessed by expert panels and several billion dollars of compensation paid. The role is not judicial or arbitral but administrative, since the issue of overall liability was settled by Security Council resolution 687 (1991).

Mediation and Good Offices

29.12 If relations between the parties are not conducive to successful negotiations or if negotiations have not succeeded, intervention by a third party may help. Good offices provide an additional channel of communication for the parties. Mediation involves the intervention of a third State or States, a disinterested party or UN organ with the disputing States in an effort to advance proposals aimed at a compromise solution. As Article 4 of the 1899 Hague Convention put it: 'The part of the mediator consists in reconciling the opposing claims and appeasing the feeling of resentment which may have arisen between the States at variance'. Usually action is by a third party of particular standing or reputation who seeks to bring about, initiate or secure the continuation of negotiations, without necessarily himself participating in the negotiations. To succeed, this method requires the agreement and cooperation of the parties. Any proposals are non-binding on the parties. The settlement is likely to require compromise on both sides, because the aim of the mediator will be to suggest proposals which both parties can willingly accept. Both the Security Council and the General Assembly are competent to recommend the use of good offices or mediation by a Member State, agency, or organ of the UN.

29.13 Three examples will suffice. The UN Secretary-General, Perez de Cuellar, mediated between France and New Zealand over the *Rainbow Warrior* affair in 1986.[11] Although the process was termed 'mediation', the parties agreed in advance that the result would be binding, and they entered into an agreement to implement its terms.[12] The Beagle Channel dispute between Chile and Argentina arose in 1978 as a result of failure by Argentina to accept or implement an award by an arbitral tribunal. A mediation by envoys of the Pope produced a settlement in 1984 which did not depend on the terms of the legal award. In 2006 UN Secretary-General Kofi Annan successfully mediated in a

[11] In 1985, the *Rainbow Warrior*, a ship owned by the environmental organization Greenpeace, was in Auckland harbour about to go on a protest voyage to Moruroa Atoll, a French nuclear test site, when it was sunk by agents of DGSE, the French foreign intelligence service. A photographer was drowned on the sinking ship.

[12] The agreement was later broken by France, and an arbitration was necessary before that further dispute was finally resolved.

territorial dispute between Nigeria and Cameroon over ownership of the Bakassi peninsula.

29.14 In September 2008, the Security Council considered a paper by the president of the Council, Burkina Faso, encouraged by its success in March 2007 in brokering an agreement between the Ivorian government forces and the former rebel Forces Nouvelles. The resulting Presidential Statement[13] issued by the Council focused on the role of mediation in settling disputes. It emphasized the importance of mediation and the role of the Secretary-General and his special representatives and envoys, exhorted the Secretariat to build up its mediation capabilities, welcomed regional efforts, and encouraged participation by women in the settlement of disputes.

Conciliation

29.15 This technique combines the characteristics of inquiry and mediation. Again, a person enjoying the confidence of the parties or a conciliation panel is tasked to establish the facts and put forward non-binding proposals for consideration by the parties. Some treaties provide for resort to conciliation if there is a dispute under the terms of the treaty concerned; while this is not now common with bilateral treaties it is more frequent in multilateral treaties. Detailed conciliation procedures are provided, for example, in the Vienna Convention on the Law of Treaties and the Convention on the Law of the Sea. In spite of the existence of these treaties, conciliation is now rarely used. The model rules for conciliation set out in General Assembly resolution 50/50[14] are unlikely to serve much practical use. One reason for its unpopularity may be that the time and expense of setting up and appearing before a conciliation panel may come close to the resources needed for an arbitration tribunal, but the parties are left without a binding result.

Arbitration

29.16 This is the determination of an outcome by a legally binding decision of one or more arbitrators or a tribunal, chosen by the parties or by a method agreed by the parties. The judges are called arbitrators and their judgement is known as an award. Arbitration has a long history. But the Permanent Court of Arbitration,

[13] Presidential statement of 23 September 2008 (S/PRST/2008/36).

[14] United Nations Model Rules for the Conciliation of Disputes between States; GA resolution 50/50 adopted on 29 January 1996.

established under the 1899 Hague Convention, has a misleading name; it provides not an arbitral court but a mechanism for facilitating arbitrations.

29.17 Compulsory settlement of disputes, such as is provided by arbitration, was a move away from a power-based system to a more principled approach. Arbitration is not dissimilar to a judicial settlement by the International Court of Justice in that the result is binding on the parties. But usually the tribunal is created for a specific purpose. Unlike resort to the ICJ, the parties have to bear the costs of the tribunal, and these can be very heavy; this will be a consideration in deciding whether to put a dispute to the Court or to arbitration. Since the tribunal's award will be final, the parties need to be quite clear about the detail to which they are signing up before entering into the proposed arbitration, with the assumption that they will submit in good faith to the outcome.

29.18 Arbitration can only settle a dispute, of course, if the parties accept the result. An example where they did not do so is the award of the Boundary Commission established to settle the boundary dispute between Ethiopia and Eritrea.[15] The arbitration used the facilities of the Permanent Court of Arbitration. Although the two States agreed to accept the award as final and binding, Ethiopia found it impossible to do so.

Judicial Settlement

29.19 While this may mean the International Court of Justice, Article 95 of the UN Charter makes clear that States may use other tribunals of choice. Further discussion of the ICJ can be found in Chapter **30**.

Regional and Other Special Arrangements

29.20 Regional organizations often have their own arrangements for addressing disputes. Indeed there is often an obligation that parties belonging to such organizations will, if in dispute with each other, follow the resolution procedures established by or within that organization.[16]

29.21 The three founding treaties of the European Union, as amended by successive treaty amendments, established the European Court of Justice with compulsory

[15] Established under the Comprehensive Peace Agreement, signed in Algiers in December 2000.

[16] See also the coverage of regional organizations and their dispute settlement procedures in Chapter **28**.

jurisdiction over certain matters within the Treaties; it gives binding judgments on actions brought by the European Commission or a Member State against a particular State or States. The Court also has other forms of jurisdiction in relation to companies and individuals, it rules on challenges to the legality of acts of the Community, and national courts refer issues of EU law to it for its decision. The Organization for Security and Cooperation in Europe (OSCE) has a large number of mechanisms for the avoidance and settlement of disputes, emphasizing dispute prevention and management, as much as settlement.[17]

29.22 The African Union (AU), established to replace the Organization of African Unity, has a Peace and Security Council with functions that include the use of good offices, mediation, conciliation, and enquiry. Members of the Commission (the Secretariat) of the AU have been active in political interventions to resolve disputes both between and within States. Similarly at a regional level in Africa, groupings have become increasingly active in resolving disputes. In 2004 and 2005, officeholders of the Economic Community of West African States were active in coping with the consequences of a coup in Guinea Bissau and the possible inauguration of an unelected president in Togo. In 2008, the Southern African Development Community attempted to secure the implementation of the power-sharing agreement in Zimbabwe.

29.23 There are many conventions, or organizations set up under their auspices, which have their own dispute settlement provisions, some of them of great complexity. The United Nations Convention on the Law of the Sea is one of these. Part XV of the Convention is entirely devoted to the settlement of disputes between parties concerning the interpretation or application of the Convention. If no solution has been reached by other means, Article 286 of the Convention stipulates that the dispute be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction. Article 287 of the Convention defines these as: the International Tribunal for Law of the Sea, set up by the Convention (with its seat in Hamburg), the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII of the Convention, or a special arbitral tribunal constituted in accordance with Annex VIII. States may declare, when they become party to the Convention, which means of settlement they choose. There are particular settlement provisions for particular kinds of disputes.

29.24 The World Trade Organization (WTO), established in 1994 to replace the General Agreement on Tariffs and Trade (GATT), has a binding dispute settlement system which has generally proved effective. The Understanding of Rules

[17] A useful summary is at <http://www.osce.org/documents/sg/2004/06/4056_en.pdf>. However, the so-called 'Valetta mechanism' for the peaceful settlement of disputes was never used.

and Procedures Governing the Settlement of Disputes provides the basis for resolving disputes relating to the application of WTO rules. The Dispute Settlement Body includes panels established where necessary and an appellate body to consider and make recommendations on specific complaints, which are then referred to the Dispute Settlement Body. The Understanding also makes reference to good offices, conciliation, mediation, or arbitration, undertaken with the consent of the parties.

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THE INTERNATIONAL COURT OF JUSTICE

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General

Located in the Peace Palace at The Hague, the International Court of Justice was established by the United Nations Charter as a forum for solving international disputes. It is a principal organ of the UN, replacing the Permanent Court of International Justice which had functioned since 1922. It is now one of a number of international courts,[1] but it remains 'the principal judicial organ of the United Nations'.[2] Most of the detailed provisions relating to its functions and powers are to be found in the Statute of the Court which is annexed to the UN Charter and forms an integral part of it.[3] While few diplomats in the course of their careers are likely to appear before the Court as representatives of their governments, the use of the Court to settle disputes, and the impact of the Court's decisions more generally, are significant features of the conduct of international affairs. **30.1**

[1] Also based in The Hague are the International Criminal Tribunal for the former Yugoslavia, the appeals chamber of the International Criminal Tribunal for Rwanda, and the International Criminal Court. The Hague is also the headquarters of the Permanent Court of Arbitration.

[2] Articles 7.1 and 92 of the Charter.

[3] Article 92. Other provisions regarding the Court are to be found in Chapter XIV of the Charter (Articles 92–6). The website of the Court gives useful information: <http://www.icj-cij.org/>. Further discussion of the Court and its procedures may be found in J G Merrills *International Dispute Settlement* (4th edn, Cambridge: Cambridge University Press, 2005) chs 6 and 7, and in S Rosenne, *The Law and Practice of the International Court* (4th edn, Martinus Nijhoff, 2006).

Jurisdiction of the Court

30.2 The Court's role is to decide, in accordance with international law, disputes which are submitted to it by States and to give advisory opinions on questions referred to it by certain United Nations organs and specialized agencies. The first of these two kinds of cases are referred to as contentious cases, the second as advisory proceedings.

Contentious cases

30.3 Only States may be parties to contentious cases before the Court. Individuals, corporations, and organizations cannot. Although the Court is sometimes referred to as the 'World Court', it is not a supreme court which national courts or individuals can use as a last resort. Nor is it an appeal court for any other international tribunal. The United Nations cannot itself bring a case against a State in its own judicial organ; however, a United Nations organ may initiate advisory proceedings if it has a right to do so.[4]

30.4 A State may be a party to a contentious case only if it is a member of the United Nations, or has become a party to the Statute of the Court, or has accepted its jurisdiction under certain conditions. All members of the United Nations are parties to the Statute by virtue of their UN membership. A State which is not a UN member may become a party to the Statute on conditions determined by the General Assembly upon the recommendation of the Security Council. Before they became UN members, Japan, Liechtenstein, San Marino, Nauru, and Switzerland were all parties to the Statute of the Court, in accordance with conditions (the same in each case) set by General Assembly resolution.[5] At present, however, all parties to the Statute of the Court are members of the United Nations.[6] While there is normally no difficulty in establishing whether a State is a UN member and, accordingly, a party to the Statute, the question did have to be decided in cases brought by or against Serbia and Montenegro in relation to the period when the legal position of the former Republic of Yugoslavia vis-à-vis the UN was uncertain.[7]

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[4] See paragraphs **30**.14 to **30**.17.

[5] These conditions were set for the first time in relation to Switzerland in resolution 91(I) (1946) of 11 December 1946.

[6] States which are not even parties to the Statute may appear before the Court upon certain conditions laid down by the Security Council (Article 35.2 of the Statute; and see Security Council resolution 9 (1946)).

[7] See in particular *Case concerning the Legality of Use of Force (Serbia and Montenegro v Belgium)* Preliminary Objections 2004 ICJ Reports paras 46–91.

30.5 The fact that a State is a party to the Court's Statute does not mean that the Court has jurisdiction to hear any case against it. The Court may hear a case only if the States concerned have agreed to accept its jurisdiction. There is no prescribed form in which the consent of a State to the Court's jurisdiction must be expressed, and consent may be given either after a particular dispute has arisen or in advance. The Court has jurisdiction over cases brought to it in one or more of three ways: (i) if the parties have agreed to refer the particular case to the Court, (ii) if the parties have previously agreed in a treaty to refer such disputes to the Court, or (iii) if each party has made a declaration accepting the jurisdiction of the Court as compulsory in the event of a dispute with another State which has made a similar declaration (Article 36.1 and .2 of the Statute).

30.6 The first way in which a case may be brought before the Court is by the consent of the parties to refer that case. Usually, but not invariably, this consent is given in the form of a written agreement or treaty, known as a 'special agreement' or *compromis*.[8] No particular form of agreement has to be used, so long as the consent is unequivocally given.[9] Consent may be deduced from acts of a State. A State may file an application in the Court and invite another State to consent to the Court's jurisdiction. For example, Djibouti made an application to the Court in 2006 against France alleging that France was in violation of a treaty of mutual cooperation for not assisting with a Djibouti investigation of the murder of a French judge in Djibouti; France, rather surprisingly, sent in a letter of acceptance agreeing to the Court's jurisdiction, and the Court was therefore able to hear the case.[10]

30.7 The second way to bring a case before the Court is under a treaty providing for the submission of a certain class of disputes to the Court when one of the parties so decides; usually these will be disputes relating to the interpretation or application of that treaty. In each case the jurisdiction of the Court depends upon whether the dispute referred to the Court is or is not within the category covered by the treaty. So, for example, in the case brought by the government of Iran against the US in 1992 seeking reparations for attacks by US naval vessels against three Iranian oil platforms, the US argued that the Iranian claims fell outside the obligations in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran, which contained a compromissory clause giving jurisdiction to the Court. The dispute as to jurisdiction was settled, as in all such

[8] In the *North Sea Continental Shelf* cases, jurisdiction was based on two agreements between Denmark and the FRG and between the Netherlands and the FRG (1969 ICJ Reports 5–7).

[9] *Corfu Channel case (UK v Albania)* Preliminary Objection 1948 ICJ Reports 27.

[10] *Case concerning certain questions of Mutual Assistance in Criminal Matters (Djibouti v France)* 2008 ICJ Reports.

cases, by the decision of the Court, the Court here finding that the dispute between the two States did concern the interpretation and application of the Treaty and that the Court therefore had jurisdiction under the compromissory clause.[11]

30.8 The third way to bring a case before the Court is by use of declarations made under Article 36.2 of the Statute (usually known as the 'Optional Clause'). Under this provision a State may declare that it recognizes as compulsory, without special agreement, the jurisdiction of the Court in a legal dispute. The declarations made in respect of the Permanent Court of International Justice, the precursor to the Court, remain valid for the Court. As between two States, both of which have made a declaration, one of them is entitled to institute proceedings before the Court against the other, and the Court will have jurisdiction so long as the subject matter of the dispute is covered by the declarations and is not excluded by any reservation. For this purpose the respondent State is entitled to rely upon any reservation made by the applicant State: the Court's jurisdiction depends on reciprocity. The United Kingdom is the only permanent member of the Security Council to have a current declaration under the Optional Clause. Its declaration, made on 5 July 2004, provides an example of some of the kinds of reservations that States make. It reads as follows:

> 1. The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 1 January 1974, with regard to situations or facts subsequent to the same date, other than:
>   (i) any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement;
>   (ii) any dispute with the government of any other country which is or has been a Member of the Commonwealth;
>   (iii) any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.
> 2. The Government of the United Kingdom also reserve the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add

[11] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, 1996 ICJ Reports 803.

to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added.

30.9 In the *Aerial Incident* case, Pakistan claimed that India was in breach of international law for the shooting down on 10 August 1999 of an unarmed aircraft of the Pakistani navy, resulting in the death of all 16 on board, who allegedly were on a routine training mission over Pakistani territory. As one of the grounds for the Court's jurisdiction, Pakistan relied on the declarations made by the two States accepting the Court's compulsory jurisdiction under the Optional Clause; India however countered that its declaration excluded disputes with any State 'which is or has been a Member of the Commonwealth of Nations'. Pakistan argued that this reservation lay outside the range of reservations permitted by the Court's Statute and was obsolete. The Court decided that the limitation on India's consent to accept the Court's jurisdiction must prevail, and since Pakistan and India were both members of the Commonwealth, the Optional Clause provided no basis of jurisdiction in this case.[12]

30.10 The Court's jurisdiction in contentious cases covers only 'disputes' between States. What is a 'dispute' for this purpose? As indicated in Chapter **29**, the Court has adopted the definition of the Permanent Court of International Justice: 'A dispute is a disagreement over a point of law or fact, a conflict of legal views or interests between two persons'.[13]

30.11 Under Article 94 of the Charter, States are required to comply with the decision of the Court in any case to which they are parties. This will usually involve action by only the government of the State concerned, but if the decision in a case requires action to be taken within a country, the State must ensure that its domestic law will allow it to comply with the judgment. An example where a State was not able to comply with a judgment of the Court, despite its wish to do so, can be found in the proceedings following the *Avena* case.[14] The Court had determined that the US should review and reconsider the convictions and sentences of some Mexican nationals as a result of US violation of their obligations to allow consular access to prisoners under the terms of the Vienna Convention on Consular Relations. Although the US administration sought to comply with

[12] *Aerial Incident of 10 August 1999 (Pakistan v India), Jurisdiction of the Court*, Judgment, 2000 ICJ Reports 12. Pakistan put forward other bases of jurisdiction for the Court but these were also ruled invalid by the Court, and the case did not proceed to the merits.

[13] The *Mavrommatis* case PCIJ Series A, No 2 (1924) 11; cited by the ICJ in, for example, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), Preliminary Objections,* Judgment, 1998 ICJ Reports 9 at para 22.

[14] *Avena and Other Mexican Nationals (Mexico v United States of America),* Judgment, 2004 ICJ Reports 12.

this decision, the US Supreme Court concluded that the decisions of the International Court of Justice were not directly enforceable in United States courts and that, in effect, the president's actions to try to give effect to *Avena* were ineffective under United States constitutional law.[15]

30.12 If a party to a case fails to comply with a judgment of the Court, the other party may resort to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to the judgment. Under this provision Nicaragua asked for an emergency meeting of the Council in October 1986 to consider the non-compliance by the US with the judgment of the Court in the *Case of the Military and Paramilitary Activities in and against Nicaragua.* This case concerned the involvement of the US in the activities of the Contras and other actions against Nicaragua. The United States twice vetoed draft Council resolutions which called for 'full and immediate compliance' with the Court's judgment.

30.13 The existence of the International Court of Justice does not of course limit the right of members of the United Nations to settle their disputes by other means. Indeed, Article 33.1 of the Charter lays down the general principle that

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Advisory opinions

30.14 The General Assembly or the Security Council may request the Court to give an advisory opinion on any legal question (Article 96 of the Charter). Other organs of the United Nations and, if they are authorized to do so by the General Assembly, its specialized agencies, may also request advisory opinions on legal questions within the scope of their activities. No other body, and no State on its own, can ask for an advisory opinion.

30.15 What is a legal question within the meaning of Article 96? The Court has stated that 'the contingency that there may be factual issues underlying the question posed does not alter its character as a legal question'.[16] Further, the fact that an advisory opinion has been requested on a political issue does not make the question a political rather than a legal one. Indeed, issues surrounding the

[15] The story can be found in the judgment of 19 January 2009 in the *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)* <http://www.icj-cij.org/docket/files/139/14939.pdf>.

[16] *Legal Consequences of the Continued Presence of South Africa in Namibia*, 1971 ICJ Reports 27.

request and giving of advisory opinions can be intensely political, as can be seen from two recent opinions: *Legality of the Threat or Use of Nuclear Weapons* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*[17]

30.16 While the Court is not *obliged* to give an advisory opinion when requested, it has never refused to respond if it has jurisdiction. The Court will decline to meet a request only for compelling reasons[18] and in order to remain faithful to the requirements of its judicial character.[19] In the *Wall* opinion the Court was asked, by resolution of the General Assembly, 'What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem?' Some participants in the Court's proceedings asked the Court to exercise its discretion and refuse to give an opinion for the following reasons: because the request concerned a contentious matter between Israel and Palestine, in respect of which Israel had not consented to the exercise of that jurisdiction; because it could impede a political, negotiated solution to the Israeli-Palestinian conflict; because the Court could not give an opinion on issues which raised questions of fact that could not be elucidated without hearing all parties to the conflict; because an opinion would lack any useful purpose; and because Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, could not seek from the Court a remedy for a situation resulting from its own wrongdoing. The Court decided that none of these was a ground for it to decline to issue an advisory opinion and it went on to do so.[20] The opinion had little effect as regards the continuing actions of the government whom it primarily concerned.

30.17 As the term makes clear, advisory opinions are only advisory and have no binding force. But they are 'authoritative in the sense that their legal correctness cannot be officially or formally questioned, by the organ to which they are rendered, acting in its corporate capacity'.[21] If the Court were to indicate that a certain course of action would be definitely illegal or that, of various courses of action proposed only one would be legal, it would be difficult in practice for the organ requesting the opinion not to follow the course advocated by the Court. It is a different matter for States, who are not formally addressed by the opinion. But, since

17 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ Reports 226 (hereafter the *Nuclear Weapons* opinion); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Reports 136 (hereafter the *Wall* opinion).

18 *Judgments of the Administrative Tribunal of the ILO,* 1956 ICJ Reports 86.

19 *Western Sahara, Advisory Opinion,* 1975 ICJ Reports 21.

20 Paragraph 65.

21 Sir Gerald Fitzmaurice in (1952) 29 *BYIL* 54.

the opinions are given by the principal judicial organ of the United Nations 'whatever be their formal authority, their persuasive character and substantive authority must be great'.[22] Finally, there is nothing to prevent advisory opinions being given binding force by agreement.[23]

The Judges of the Court

30.18 The Court has 15 judges, no two of whom may be nationals of the same State. The judges are elected by the General Assembly and the Security Council, voting simultaneously but independently of each other. In order to be elected, a candidate must receive an absolute majority of the votes in both bodies. For voting in the Security Council, the permanent members do not have a veto.

30.19 The judges are elected from candidates in a list of persons nominated by 'the national groups in the Permanent Court of Arbitration' (Article 4 of the Statute). This means that governments of States do not have the right to propose candidates; that is the role of the four jurists in each State who can be called upon to serve as members of an arbitral tribunal under the Hague Conventions of 1899 and 1907.[24] Each group may nominate up to four candidates, not more than two of whom may be of their own nationality.

30.20 The judges must be 'persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law' (Article 2 of the Statute). It is the intention that in the Court as a whole there should be representation of the main forms of civilization and of the principal legal systems of the world, and as a result, the judges are in practice chosen from the different regional groups of the United Nations as follows: three from Africa, three from Asia, two from Latin America and the Caribbean, five from Western Europe and other States, two from Eastern Europe. Of these, judges of the nationality of the permanent members of the Security Council have always been included in the Court. Judges are elected for nine-year terms and may be re-elected.

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[22] Ibid, 55.

[23] Thus, sect 30 of the General Convention on the Privileges and Immunities of the United Nations provides as follows: 'If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

[24] For States not represented on the Permanent Court of Arbitration, candidates are nominated by national groups appointed by their governments for this purpose and under the same conditions.

Before taking up their duties, the judges make a solemn declaration that they will exercise their powers impartially and conscientiously. A judge cannot be dismissed unless, in the unanimous opinion of the other judges, he or she can no longer fulfil the required conditions. This has never happened. The judges may not exercise any political or administrative function or engage in any other occupation of a professional nature, nor act as agent, counsel, or advocate in any case, nor participate in cases in which, before their election, they have taken part in any capacity. The judges enjoy diplomatic privileges and immunities when engaged on the business of the Court.[25] **30.21**

The Court usually sits as a full court, but it can be formed into chambers. Article 26.1 of the Statute allows the Court to create a chamber to deal with certain categories of cases; under this provision the Court set up a Chamber for Environmental Matters in 1993. It was never used, however, since no State ever asked that a case be dealt with by it, and in 2006 the Court decided not to continue holding elections for the chamber. Under Article 26.2 of the Statute, an ad hoc chamber can be formed to deal with a particular case and this has been done in six cases so far, at the request of the parties. The informal practice is to allow the parties to choose the judges who will sit in the chamber. Each of the chambers has so far comprised five members; in three of the cases the chamber was composed of three ICJ judges and two ad hoc judges chosen by the parties.[26] **30.22**

Applicable Law

Article 38, which is one of the most important articles in the whole Statute, states: **30.23**

1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

[25] In an exchange of letters between the president of the Court and the Dutch minister of foreign affairs on 26 June 1946, it was arranged that members of the Court would, in a general way, enjoy the same privileges immunities, facilities, and prerogatives as heads of diplomatic missions in The Hague (*ICJ Acts and Documents,* No 1, 2nd edn, 86, 90). In The Hague the president of the Court takes precedence over the Dean of the Diplomatic Corps.

[26] The six cases were: the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* between Canada and the United States, the case concerning the *Frontier Dispute* between Burkina Faso and the Republic of Mali, the case concerning *Elettronica Sicula SpA (ELSI)* between the United States of America and Italy, the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, the *Frontier Dispute (Benin/Niger)* case, and the *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador v Honduras)*. The last three comprised three Members of the Court and two judges ad hoc chosen by the parties.

(b) international custom as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

30.24 The sources of law mentioned in subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 above are now generally regarded as the sources of international law which *any* international tribunal should apply in the absence of an express direction to the contrary. The Court may also decide a case *ex aequo et bono* if the parties agree; it has not done so yet.

30.25 Since a decision of the Court has no binding force except between the parties and in respect of that particular case, the Court is, in strict law, not bound even by its own precedents, let alone by the decisions of other international tribunals. In practice, however, the Court attaches great weight to previous decisions, not only its own and those of the Permanent Court of International Justice, but also on occasions those of arbitral tribunals of high standing.

Procedure before the Court

30.26 Contentious cases are begun by filing with the Court either an application, or the *compromis* or special agreement, where one exists. The application is signed by the agent or some other duly authorized person. As agent it is usual to appoint a legal adviser to the foreign ministry or a diplomatic representative in The Hague. The agent, who acts as the link between the Court and the applicant State, is responsible generally and at all stages for the handling of the case. In drawing up pleadings and presenting argument orally the agent is generally assisted by Counsel, including in some cases law officers, and international law academics. An application must identify the parties, the basis of the Court's jurisdiction, the nature of the dispute, and the precise nature of the claim. It must summarize the main facts and grounds on which the claim is based. These are developed in detail in the Memorial, to which documentary evidence is attached.[27]

30.27 The official languages of the Court are French and English, although there is nothing to prevent a party using another language provided it arranges for a translation to be made into one or other of the official languages. The procedure consists of two parts: written and oral, and the oral proceedings may include

[27] Rule 35 of the Rules of Court.

the hearing of the evidence of witnesses. The hearing is public, unless the Court decides otherwise, or unless the parties demand that the public are not admitted.

30.28 Sometimes a State has chosen not to appear before the Court. Nevertheless, the Court will decide on its jurisdiction and on the merits of the case. For example, Iran did not appear in a case brought to the Court by the US after some of its embassy staff had been taken hostage and its diplomatic premises taken over.[28] The Court proceeded to decide the case, establishing the facts by reference to material provided by the US and from public sources.

30.29 If a case is brought before the Court by the application of one party alone, the other party may object to the jurisdiction of the Court or to the admissibility of the case, provided that is done before the expiry of the time-limit fixed for the delivery of the first pleading. This will cause the proceedings on the merits to be suspended while the Court hears the objection. It is for the Court itself to judge whether the objection is valid. Three possibilities are open to the Court: to uphold the objection, to overrule it, or to join it to the merits of the case to be heard at the same time.[29]

30.30 Objections to jurisdiction have been discussed above. Admissibility is a concept separate from that of jurisdiction and goes to the nature of a case. If the applicant's claim is found to concern a dispute which has disappeared or if a case is found to be moot, academic, or devoid of object and purpose, then the Court will declare the case inadmissible and decline to adjudicate upon its merits.[30] The reason is to safeguard the judicial function of the Court. A case can become moot after the filing of the application, for example as a result of a change of practice or the giving of undertakings on the part of the respondent.[31]

30.31 The deliberations of the Court take place in private and remain secret. All questions are to be decided by a majority of the judges present, and in the event of an equality of votes, the president or the judge who acts in his place has a casting vote. The judgment states the reasons on which it is based and any judge may deliver a separate opinion, which may be either a 'dissenting opinion', or an 'individual opinion' agreeing with the conclusions of the judgment, though not necessarily with the reasons on which it is based. The judgment is final and without appeal. The Court may, however, be asked to interpret it if a dispute

[28] *Case concerning United States Diplomatic and Consular Staff in Tehran,* Judgment, 1980 ICJ Reports 3; see Chapter **8**, paragraph **8**.16 for further details of the case.

[29] The rules governing preliminary objections which are usually, though not necessarily, objections to the jurisdiction are contained in Article 67 of the Rules of Court.

[30] *Northern Cameroons* case, 1963 ICJ Reports 15.

[31] *Nuclear Tests* cases 1974 ICJ Reports 253 and 451.

arises as to its meaning or scope [32] or even to revise it in the event of a new decisive fact being discovered.

30.32 A State which considers that it has an interest of a legal nature which may be affected by the decision in the case may ask the Court to be permitted to intervene. Such requests are rare. However, third parties have an automatic right to intervene whenever the Court has to decide on the interpretation of a treaty to which they are party. If they exercise this right, they are bound by the judgment. Usually each party has to bear its own costs; having regard to the fees charged by counsel and the expenses necessary in obtaining evidence, those costs can be substantial. The costs of the Court itself are met not by the parties (as is the case with arbitrations) but from the UN budget. For States to whom the cost of taking a dispute to the Court would be prohibitive, a trust fund has been created to provide financial assistance in certain circumstances. Funds are provided only in cases where the jurisdiction of the Court is not in doubt.[33]

30.33 If the Court already includes judges of the nationality of both the parties, these judges retain their right to sit in the case. If the Court includes a judge of the nationality of one of the parties only, the other party has the right to choose a judge for that particular case, who will usually, but not always, be of that party's nationality. If the Court does not include a judge of the nationality of either of the parties, both parties have the right to choose a judge for that particular case.

30.34 The procedure for applications for advisory opinions is a little different. The Court may hold written and oral proceedings. States and international organizations will be asked to give information on the question before the Court, in particular the States Members of the organization which has requested the opinion. Those States are not in the same position as parties to contentious proceedings. Any State not consulted by the Court may ask to take part. Participants may submit written statements, and States are then usually invited to present oral statements at public hearings. Palestine was invited to (and did) participate in the proceedings relating to the Wall opinion and the 'Provisional Institutions of Self-Government of Kosovo' were invited to (and did) participate in the proceedings for the advisory opinion which concerned the declaration of independence made by those institutions.[34]

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[32] As in the *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and other Mexican Nationals (Mexico v United States of America).*

[33] Information about the trust fund may be found on <http://www.un.org/law/trustfund/trustfund.htm>.

[34] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for an Advisory Opinion) 2008.

Interim Measures of Protection

30.35 The Court may order provisional or interim measures 'which ought to be taken to preserve the respective rights of either party' (Article 41 of the Statute).[35] In some cases, the Court has ordered both parties to refrain from taking any action 'which might aggravate or extend the dispute . . . or prejudice . . . rights . . . in respect of the carrying out of whatever decision the Court may render in the case'.[36] If the rights are such that any breach of them eventually found could be repaired (for example, by the payment of compensation), or if the parties have already accepted obligations to refrain from actions which would aggravate the dispute (for example, through the Security Council), the Court will not order interim measures.[37]

30.36 Under Article 66 of the Rules of Court, requests for such measures will be treated as a matter of urgency; if the Court is not sitting, the judges will be convened by the president forthwith. The Court has power in certain circumstances to indicate interim measures even before it has decided that it has jurisdiction. But where it does not *prima facie* have jurisdiction, it will not do so, as in the *Case Concerning Legality of Use of Force (Yugoslavia v Belgium),* one of the cases brought by the Federal Republic of Yugoslavia against NATO States in relation to the bombing of the FRY in 1999.[38] The Court is entitled to indicate measures other than those proposed in the request and even to indicate measures *proprio motu* (ie without any request having been made).

30.37 It was once a controversial question whether the measures indicated by the Court are legally binding or not. The words 'indicate' and 'suggested' in Article 41 may give the impression that the measures are not intended to be binding, but the Court has decided that provisional measures do have a binding effect. In a case brought by Germany against the US in relation to the rights under the Vienna Convention on Consular Relations of two German brothers sentenced to death in US courts, the Court ordered that the US should take 'all measures at

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35 Further information about provisional measures can be found in S Rosenne, *Provisional Measures In International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford: Oxford University Press, 2005).

36 *Nuclear Tests* cases (1973 ICJ Reports 93 and 135, at 106 and 142 respectively). Similar orders are frequently made.

37 *Aegean Sea Continental Shelf* case (*Greece v Turkey*) 1976 ICJ Reports 3. Nor will interim measures be ordered in cases where the need for such measures is not urgent: *Interhandel* case (*Switzerland v US*), 1957 ICJ Reports 105 and 112 and *Pakistani Prisoners of War* case (*Pakistan v India*), 1973 ICJ Reports 330.

38 *Legality of Use of Force (Yugoslavia v Belgium)*, Provisional Measures, Order of 2 June 1999, 1999 ICJ Reports 124.

its disposal' to ensure that the remaining brother was not executed prior to the Court's judgment in the case. The US government transmitted the order to the Governor of Arizona, who did not give effect to it and the German national was executed. The Court found that the US had failed to take the measures at its disposal to prevent the execution before the Court had disposed of the case and the US was accordingly in breach of its obligation under the order for provisional measures.[39]

[39] *LaGrand (Germany v United States of America)*, Judgment, 2001 ICJ Reports 466, paras 98–109; the Court's reasoning drew on the French text of the Statute and its object and purpose.

31

INTERNATIONAL WAR CRIMES TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

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When the Nuremberg trial ended, it was thought that it might be a precedent for international trials in other contexts. Judge Robert Jackson, one of the Nuremberg prosecutors, said in his opening speech for the prosecution that 'while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment'.[1] Cold War divisions and other factors combined to make international agreement on an early successor to Nuremberg impossible. No new international criminal courts were established until the 1990s, when the Security Council set up the ad hoc Tribunals for the former Yugoslavia and for Rwanda. The relative success of the creation of these two bodies contributed to the impetus for the establishment of the International Criminal Court, a permanent institution, in 1998. Other courts with international elements have since been created. All these courts and tribunals share the characteristic that they have jurisdiction over individuals, not States. **31.1**

[1] *Trial of Major War Criminals, Nuremberg* (London, 1946).

31.2 This chapter discusses the two Tribunals created by the Security Council and the International Criminal Court as well as, more briefly, other courts with international elements. The diplomat cannot leave these new institutions to the lawyers. The impact of the courts and tribunals and of the new body of international criminal law which they apply will be felt in many areas. Negotiations for resolving a conflict can no longer ignore questions of responsibility for atrocities committed in the course of the conflict. Proposals for post-conflict reconstruction will need to deal with such questions as whether alleged criminals should be tried within their own countries or by an international court. If the choice is for national trials, the national judicial systems may need to be supported by the international community. The tension between peace and justice may have to be addressed: with the new international institutions has come a widespread acceptance that victims of atrocities demand retribution, but at the same time the possibility of international trials for leaders may make peace negotiations with them more difficult.

31.3 Government officials will also need to be aware of the obligations their governments must comply with when they are faced with requests and orders from the international courts for assistance and cooperation. These requests may ask for the provision of evidence, assistance with investigations, and the transfer of suspects to the court concerned. These matters are dealt with at paragraphs **31**.37 and **31**.38 below.

31.4 Finally, for all persons who are engaged in a conflict themselves, in whatever capacity, the existence of the International Criminal Court, with its wide jurisdiction, must be taken into account. The creation of the Court emphasizes the importance of complying with international law on matters such as the conduct of hostilities and the treatment of civilians. If war crimes are committed, those responsible for participating in or ordering them may be vulnerable to international prosecution.

The International Criminal Tribunal for the Former Yugoslavia

31.5 The armed conflicts which led to the dissolution of Yugoslavia were accompanied by large-scale atrocities, including the practice of driving civilians of a minority ethnic group out of one part of a country or another, an atrocity known by the unattractive term 'ethnic cleansing'. The UN Security Council adopted resolutions which sought (unsuccessfully) to put an end to the conflicts, interposing UN missions for peacekeeping and peace enforcement; it also established a commission to investigate allegations of international crimes. The Secretary-General

consulted Member States about the creation of a tribunal to try the crimes concerned and the result was a recommendation from the Secretary-General that the Council create a tribunal by Council resolution, the alternative course of creating a tribunal by intergovernmental treaty having been rejected as taking too much time. Some States questioned whether the establishment of a tribunal was within the powers of the Council, but the Council nevertheless adopted resolution 827 (1993), thereby creating the 'International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991'.

31.6 The Tribunal is more briefly known as the International Criminal Tribunal for the Former Yugoslavia, or more briefly still as ICTY. It is based in The Hague, and its powers, composition, and jurisdiction are set out in a Statute which was prepared by the UN Secretariat.[2] The resolution creating ICTY was adopted under Chapter VII of the Charter of the United Nations and the requirement on all States to cooperate with the Tribunal is therefore legally binding.

31.7 ICTY has jurisdiction over certain war crimes, crimes against humanity, and genocide, committed after 1 January 1991 in those countries which are within the territory of the former Yugoslavia. Its jurisdiction has no end limit in time, so that the later conflicts in Macedonia and the NATO military intervention in 1999 relating to Kosovo are also included. As regards the latter, the Prosecutor considered opening an investigation into crimes alleged to have been committed by NATO States, but she decided after inquiry that no formal investigation was justified, thus coming under criticism from different quarters for both decisions—to order an inquiry at all and not to open an investigation.

31.8 ICTY has primacy over national courts. This means that if a case is being tried in a national court, ICTY can require the case to be transferred to it.[3] Although this happened in the first stages of the Tribunal with, for example, the transfer of Duško Tadić, a Bosnian Serb, to the ICTY from Germany, cases are now going in the other direction and ICTY is transferring evidence and cases to the national courts of the region for investigation or trial.

31.9 By June 2009, the Tribunal had concluded proceedings against 120 indictees out of a total of 161; proceedings had started for all of the remaining indictees except for the two who remain at large at the time of writing—Ratko Mladić and Goran Hadžić. Over 3,500 witnesses had given evidence before the Court.

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[2] The Statute of ICTY may be found on the Tribunal's useful website <http://www.un.org/icty/>.

[3] Rule 9 of the Rules of Procedure and Evidence sets out the situations when deferral by the national courts is justified.

Cases arising from some of the worst incidents in the different conflicts resulting from the dissolution of the former Yugoslavia, and the conflict in Kosovo, have been brought before the Tribunal. For example, the Srebenica massacre of some 8,000 Muslim men and boys gave rise to ICTY indictments and trials for genocide. The most high-profile trial of the Tribunal was that of ex-President Milošević, which lasted for four years and one month and was far from complete when it ended in his death in detention.

31.10 The Tribunal was not set up as a permanent body and it has been encouraged by the Security Council to draw its proceedings to a close, with the adoption of a 'completion strategy'. (See report of 18 May 2009 (5/2009/252).) But with the arrest of Radovan Karadžić, ex-president of the *Republika Srpska*, who has been charged with genocide, war crimes, and crimes against humanity, another major trial has begun and the timing of the Tribunal's closure remains uncertain.

The International Criminal Tribunal for Rwanda

31.11 The genocide which took place in Rwanda in 1994, causing the deaths of some 800,000 Tutsis and moderate Hutus, produced waves of horror and also of guilt for the international failure to prevent the commission of the atrocities. It was felt that if a tribunal was appropriate in Europe, the same model should be used for Africa. The Security Council accordingly set up first a fact-finding Commission and later the International Criminal Tribunal for Rwanda. Like ICTY, the Rwanda Tribunal (or ICTR) is established by a resolution adopted under Chapter VII of the UN Charter,[4] thus giving binding legal force to its orders.

31.12 Rwanda was a member of the Security Council at the time the Tribunal was established but, while initially favourable to the concept, it voted against the relevant resolution for reasons which included the lack of the death penalty in the sentences available to the Tribunal. The Tribunal's relationship with the Rwandan authorities has been an uneven one, and the government suspended cooperation at one time after the Tribunal had declined jurisdiction over one of the mass media advocates of genocide, a decision which was later revised.

31.13 The Tribunal is based in Arusha, Tanzania; it shares the Appeals Chamber of ICTY, which remains in The Hague. It has jurisdiction over genocide, war crimes, and crimes against humanity, like ICTY, but the definitions of the last two crimes have slightly different definitions from those in the ICTY Statute. The main contribution of the Tribunal to international criminal law has been in its case law

[4] Resolution 955 (1994).

on genocide. The crime is notoriously difficult to prosecute due to the narrow definition in the 1948 Genocide Convention.

31.14 The first conviction for genocide by ICTR was of Mayor Jean-Paul Akayesu, followed two days later by the conviction, after a guilty plea, of Jean Kambanda, the former prime minister of Rwanda. These trials were historic, marking the first convictions for genocide by an international court. By May 2009, the Tribunal had completed the trials of 44 persons. Like ICTY, ICTR has a limited life and a completion strategy has been agreed. (See report of 14 May 2009 (5/2009/247).) But as with ICTY, the date on which it will finally end its proceedings is difficult to predict.

The International Criminal Court (ICC)[5]

31.15 The ICC was created in a moment of both triumph and disappointment: triumph that there was at last a permanent court designed to put an end to the culture of impunity, but disappointment that there was not a unanimous vote for the adoption of the Court's Statute, signifying troubles for the Court in the future.

31.16 The idea of a permanent international criminal court had been current long before the Nuremberg trial,[6] but nothing came of it until the government of Trinidad and Tobago provided the impetus in 1989. Wanting to secure international prosecutions for drugs offences which were proving difficult to deal with on a national basis, the government of Trinidad and Tobago proposed that the creation of a permanent international criminal court be put back on the agenda of the United Nations. The government succeeded in their objective of establishing a new court—but the Court that was finally agreed upon does not have any jurisdiction over drugs offences.[7]

31.17 Although the ICC originated with a process in the United Nations, the Court is not a creature of the United Nations, but was established by intergovernmental treaty. In this respect it differs from the two Tribunals.

5 For further reading, see W A Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge: Cambridge University Press, 2007).

6 The first formal proposal for such a court was probably that of Gustav Moynier, one of the founders of the International Committee of the Red Cross; see C K Hall, 'The First Proposal for a Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 57.

7 A resolution adopted by the Conference at its closing session recommended that drugs crimes (and terrorism) be considered at a review conference 'with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court'. It is however unlikely that any such crimes will in fact be included, at least at the review conference taking place in 2010.

31.18 The negotiations for the treaty which was to set up the new permanent court began at the United Nations in New York, and culminated in a five-week conference in the FAO building in Rome; the Statute for the International Criminal Court was adopted on 17 July 1998. At the time of writing, there are 108 States Parties to the Statute. Whether or not a State is a party is relevant as to whether that State will have the obligation to cooperate with the Court, and as to the extent of the Court's jurisdiction, as will be seen below.

Jurisdiction

31.19 The ICC has jurisdiction over genocide, crimes against humanity, war crimes, and aggression—but the crime of aggression cannot be tried by it unless and until the Statute has been amended to add both a definition of that crime and provisions governing the jurisdiction of the ICC. Unlike the Statutes of the two ad hoc Tribunals, the ICC Statute spells out in some detail the elements of the crimes which it can try; these follow by and large the definitions of the crimes under existing international law, with some changes. In brief, genocide is defined, as in the Genocide Convention 1948, as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) killing members of the group;
> (b) causing serous bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.[8]

'Crimes against humanity' are defined as listed acts such as murder, deportation, torture, persecution of a group, and enforced disappearance, 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[9] There is a long list of war crimes, loosely drawn from the Geneva Conventions and the two Protocols, divided into crimes

[8] Article 6 of the ICC Statute.

[9] Article 7. The full list of acts is '(a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.'

committed in international conflict and those committed in non-international conflict.[10]

31.20 The Court cannot try a crime within the categories mentioned above unless it has jurisdiction over the person concerned. It may try a crime only (i) if one or more of the following States are parties to the Statute or have formally accepted the jurisdiction of the Court in relation to the particular crime: (a) the State on whose territory the crime was committed, or (b) the State of which the suspect is a national; or (ii) where a situation has been referred to the Court by the Security Council under Chapter VII of the UN Charter (Articles 12 and 13). For example, Sudan was not a party to the ICC Statute when the Security Council referred the situation in Darfur to the Court in 2005;[11] the Court now has jurisdiction over Sudanese nationals and any others who have committed crimes in Darfur, but this would not have been so if the Council had not referred the situation.

31.21 The ICC does not have retrospective jurisdiction. It can try only crimes committed after 1 July 2002, the date on which the Statute entered into force. If a State becomes party to the Statute later than that date, the relevant date for the Court's jurisdiction will be the date of entry into force of the Statute for that State.

Complementarity

31.22 It is not enough that the ICC has jurisdiction over a crime and over the alleged criminal. It will not be able to try the case (because the case will be 'inadmissible') if national authorities are investigating or prosecuting, or have done so—unless national authorities have shown themselves unable or unwilling 'genuinely' to investigate or try the case. Inability and unwillingness have been defined in the ICC Statute as follows:

> Article 17:
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . .;
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the

[10] Article 8.
[11] By resolution 1593 (2005).

circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The relationship of the ICC with national authorities is termed 'complementarity' and is a major feature of the Court. It means that, unlike the two Tribunals, the ICC does not have primacy over national jurisdictions; rather the reverse. It is a court of last resort. States themselves have the responsibility to prosecute offenders if they are able properly to do so. Indeed, the Prosecutor in an oft-quoted statement has said:

> The effectiveness of the International Criminal Court should not be measured by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.[12]

While this is an exaggeration, it nicely makes the point.

Initiating and suspending proceedings

31.23 Unlike national criminal systems which allow the launching of a prosecution after an investigation by police or prosecutors, the ICC has special provisions regarding the institution of its proceedings. A 'situation' may be referred to the Court by a State Party to the Statute, or by the Security Council. The Prosecutor then decides whether to open an investigation of the situation and to apply to the Pre-Trial Chamber for arrest warrants. Alternatively, the Prosecutor may begin an investigation of a situation without a referral, if the Pre-Trial Chamber authorizes it. At the time of writing, the Prosecutor has not sought authorization to begin any investigation where there has been no referral by a State or the Security Council.

31.24 The Security Council has another role. The ICC must suspend any proceedings for a year if the Council decides under Chapter VII of the Charter to request it to do so; the Council may renew its request year by year. This unusual provision is to be found in Article 16, which was intended to ensure that ICC proceedings would not prejudice the interests of international peace and security. As we shall see later, the Article has been used for an unexpected purpose.

[12] Paper on some policy issues before the Office of the Prosecutor', September 2003, on the website of the ICC <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf>.

The Court and its procedures

31.25 Of the various chambers among which the judges are divided (Pre-Trial, Trial, and Appeals Chambers) the Pre-Trials Division is a compromise between the common law prosecutorial system and the French system of *juges d'instruction.* The judges of the Court must have competence either in criminal law or in relevant areas of international law. States, in electing the judges, must take into account the need for representation of the principal legal systems of the world, equitable geographical representation and, for the first time in criteria for elections to an international tribunal, the need for a fair representation of female and male judges. Complex voting rules have been adopted with these criteria in mind (except for the representation of the world's legal systems—an exclusion justified on the basis that this criterion should largely be met if geographical representation is equitable). Unfortunately, the ICC suffers from the standard international practice for elections, whereby votes are sometimes 'traded' among States for reasons other than the personal and professional qualities and attributes of the judges and this means that the composition of the Court has not always been constituted entirely of the best judges available.

31.26 Unlike any other international tribunal, the ICC has procedures allowing victims to participate in its proceedings. The practical consequences remain to be fully worked out. The participation of the huge number of victims resulting from a large-scale commission of crimes against humanity and genocide, for example, could risk overwhelming the Court and prejudicing a fair trial unless careful limits are set.

Challenges to the Court

31.27 There is not universal support for the Court. Some of the States which are not parties to the Court's Statute have expressed concerns that their nationals may be tried by the Court without their consent. The United States, in particular, at one time worked actively to undermine the Court.

31.28 In the months before the ICC Statute came into force, the US looked for ways to prevent the Court taking jurisdiction over US nationals. The government of the United Kingdom was able to announce in Parliament that no British soldier would be tried by the ICC because any serious allegation of a crime would be put to the UK prosecuting authorities and this would be enough to make the case inadmissible before the Court. But the US was not content to rely on complementarity in this way. The administration sought various ways of avoiding ICC jurisdiction over their nationals. First, they used the Security Council to seek explicit exemption from ICC proceedings. In 2002, the US vetoed the renewal by the Council of a peacekeeping operation in Bosnia and Herzegovina and

insisted that US nationals who were engaged in the operation be exempted from ICC jurisdiction. The impasse in the Council was resolved only when another resolution was agreed upon, which requested the ICC, in accordance with Article 16 of its Statute, to defer any exercise of its jurisdiction for 12 months 'if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation'.[13] A further resolution requesting suspension of proceedings for another 12 months was adopted in 2003[14] but, the following year, support in the Council had dwindled and there was not the necessary majority to adopt another resolution in the series. The resolutions have had no impact in practice, since no ICC proceedings were envisaged in the relevant periods. Later, however, two other provisions were included in Council resolutions which give States not parties to the ICC Statute sole jurisdiction over their personnel in relation to forces in Liberia and later, in Darfur, thus excluding the jurisdiction of the Court.[15] In addition to the use of Security Council resolutions in this way, the US entered into bilateral agreements with a number of States, to bar US personnel from ever being transferred to the Court. Acceptance of these agreements was forced upon some States by threats to remove US military and other aid, a threat that was backed and even required by US legislation, the American Service-members' Protection Act.

31.29 The US has become less hostile to the Court. After a long struggle at the UN in New York in 2005, the US was persuaded not to veto a Security Council resolution referring the situation in Darfur to the ICC. The US then took a position of firm support for the Court's proceedings with regard to Darfur and has since given practical assistance to the Court.

First cases at the Court

31.30 The first investigations undertaken by the ICC were all in Africa. The Lord's Resistance Army (LRA) had been engaged in murder, the brutalization of children, rape, and slavery for almost two decades when the government of Uganda referred the situation to the ICC. The Court issued arrest warrants for Joseph Kony and his fellow leaders for crimes against humanity and war crimes. Then the government of the Democratic Republic of Congo (DRC), where millions of civilians had been killed during the years of civil war and internationally sponsored conflicts, referred that situation to the Court. From the DRC referral came

13 Security Council resolution 1422 (2002); it was renewed the next year in a similarly worded resolution, 1487 (2003).

14 Security Council resolution 1487 (2003).

15 Security Council resolution 1497 (2003), para 7 and 1593 (2005) para 6.

the first case to be tried by the Court—that of Thomas Lubanga Dyilo, charged with the war crime of enlisting child soldiers. Further cases include charges of war crimes in the Central African Republic; and, following the Security Council's referral of the situation in Darfur to the Court, arrest warrants were issued against three accused, who include the president of Sudan.

31.31 The ICC faces unique problems. The crimes subject to its jurisdiction will in most cases be ones committed in situations of ongoing conflict where investigations on the ground are risky or impossible. Effective witness protection schemes will be necessary if evidence is to be collected. The initiation of ICC investigations with the threat of arrest warrants to follow should have a deterrent effect on the commission of further crimes but that effect is not always apparent. There may also be allegations, as with northern Uganda and the LRA, that peace negotiations will be prejudiced by the claims of retributive justice. These allegations may not be justified, but they complicate the task of the Court. The warrant against the president of Sudan has led to African demands that the Security Council step in to suspend proceedings under Article 16 of the Statute. Further, because it does not have the enforcement mechanisms enjoyed by any national judicial system, the Court has to rely on the cooperation of States to enforce its orders and to cooperate with investigations and the arrest and surrender of suspects; this cooperation is not always available, particularly where the State concerned does not support the proceedings of the Court.

Other Courts with International Elements

31.32 The new focus on justice for the victims of conflict-driven crimes has given rise to other kinds of international assistance in the provision of courts with international elements. There is not a single model for such courts.[16]

31.33 The Special Court for Sierra Leone was created in 2002 by treaty between the UN and Sierra Leone, following years of very violent civil war. The UN Secretary-General appoints the international judges to the Court; they are in the majority, while the minority are appointed by the government of Sierra Leone. The Court has jurisdiction to prosecute persons 'who bear the greatest responsibility' for crimes against humanity, certain war crimes, and specified breaches of domestic law, committed in the territory of the country since 30 November 1996. The most high-profile accused is Charles Taylor, the former president of Liberia, who was eventually transferred to the Court for trial in March 2006. For security

[16] For a fuller overview see chapter 9 of R Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007).

reasons, however, his trial took place not at Freetown, the site of the Court, but in The Hague at the premises of the International Criminal Court. The ICC had no connection with the trial other than the loan of its court rooms. Like other courts with international elements, the Special Court has had financial difficulties, since it has had to rely on voluntary funding. This is a factor which should give pause to the creation of other such courts in the future.

31.34 The slaughter of hundreds of thousands of victims during the period of the Khmer Rouge regime in Cambodia led eventually to the creation of the so-called 'extraordinary chambers' of Cambodia, though more than two decades after the event. Although supported by a treaty between the UN and the government, the chambers form part of the domestic system. National judges are in the majority. Crimes which can be tried by the chambers include genocide as defined in the 1948 Genocide Convention, crimes against humanity, and some war crimes. The jurisdiction of the chambers is limited to the relevant period: 17 April 1975 to 6 January 1979. The death of Pol Pot means that the one person who was almost certainly most responsible for the crimes will not be brought to justice.

31.35 Another treaty-based court is the Special Tribunal for Lebanon, set up to try those responsible for the assassination of Rafik Hariri, the former prime minister of Lebanon, and for other connected terrorist incidents. When a political impasse led to the impossibility of bringing the treaty into force under Lebanese constitutional procedures, the Security Council adopted a resolution (1757(2007)) under Chapter VII of the Charter to bring it into force. The Tribunal has its seat outside Lebanon and the international judges are in the majority. Although the Tribunal was set up by an international process, it is to apply only domestic law and its jurisdiction is over terrorist acts and other crimes under Lebanese law. No other State but Lebanon is under an obligation to cooperate with the Tribunal.

31.36 Other courts with international elements and with jurisdiction over international crimes included the 'Regulation 64 Panels' in Kosovo set up by the United Nations mission in Kosovo, now replaced; the 'Serious Crimes Panels' set up by the UN Transitional Administration in East Timor, but now disbanded; and the War Crimes Chamber in Bosnia and Herzegovina. Two courts which are entirely national but were given international support in their establishment are the Iraqi Higher Tribunal and the War Crimes Chamber of the Belgrade District Court in Serbia.

Impact on National Law

31.37 In order to guarantee the effectiveness of the Tribunals for the former Yugoslavia and for Rwanda, States are under an obligation to cooperate fully with them in the investigation and prosecution of offences. States Parties must also cooperate

with the International Criminal Court. The extent to which States are obliged to cooperate with other courts with international elements depends on what is said in the agreement or other instrument establishing the court concerned. Where the Security Council refers a case to the ICC under Chapter VII of the UN Charter, this obligation can be extended to all Member States of the UN—though in the case of Sudan it was applied only to the parties to the conflict. States must, if necessary, change their national law to allow them to cooperate with the Tribunals or the ICC. A State must be in a position to comply with requests from the ICC, ICTY, and ICTR to identify and locate suspects, to take evidence, to search premises, and to require the production of documents and other materials, as well as to freeze assets and, crucially, to surrender a person to a court or tribunal where it has issued a warrant of arrest. For the two Tribunals, there is no bar under national or international law to the prosecution of heads of state, foreign ministers, diplomats, and others, and all States must hand over any such person if sought by one of the Tribunals. The same goes for the ICC, so far as the heads of State and representatives of States Parties are concerned.

31.38 It is a matter for the national law of each State to designate the appropriate authorities for the handling of requests for cooperation from the Court and Tribunals, and the diplomat, whether in a posting or at home, must turn to the legal advisers of his own country for guidance in the event of a request.

31.39 The primacy of national jurisdictions over the ICC—the principle of complementarity—has been mentioned at paragraph **31**.22 above. The ICC is a court of last resort. This creates an incentive for States to make punishable under their national law the offences under the Statute, and to ensure that the jurisdiction of their courts is at least as wide as that required under the Statute. How this is to be done is left to the individual States Parties. For example, in the United Kingdom International Criminal Court Act 2001 the offences listed in the Statute are made offences in British law, without further definitions and without listing already existing offences corresponding to them. Provided that a State is acting genuinely in pursuing an alleged offender, the case can be dealt with by its own courts and the ICC is shut out.

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Book VIII

ALTERNATIVE AND NON-STATE DIPLOMACY

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32

NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

32.1 Civil society, that offshoot of the enlightenment, has developed in the early twenty-first century into a benchmark of a fully functioning democracy. One of its key manifestations is the flourishing of organizations outside the state sector. India for example is estimated to have over 1 million non-governmental organizations (NGOs). In 1997, the then UN secretary-general discussed the increasing influence of civil society within the United Nations and pointed out that civil society actors were 'now perceived not only as disseminators of information or providers of services but also as shapers of policy, be it in peace and security matters, in development or in humanitarian affairs'.[1] Non-governmental organizations come in many shapes and sizes. Many have a charitable base and some will have humanitarian or human rights objectives; others focus on sustainable development and aid. Often their concern will be a single issue, eg climate change. Their objectives will be focused and invariably single-minded, less able or willing to take into account other aspects. As a result their relationship with governments, although sometimes harmonious, may be one of tension and occasionally confrontation. Whereas an NGO will usually have a bias in favour of bringing matters into the open, a government has to balance out all the interests involved and is generally predisposed to favour confidentiality and discretion to avoid embarrassment to itself or damage to its relations with other governments. Increasingly NGOs scrutinize and criticize the performance of government, and indeed a few NGOs will be active in the diplomatic field, sometimes duplicating, often monitoring, the performance of governments and international or national organizations. NGOs such as Amnesty International traditionally saw their role as one of challenge to States which they considered to be failing to meet their human rights obligations, but they are often seriously disadvantaged compared to States in terms of resources and access to information.

[1] Renewing the United Nations: A Programme for Reform, Report of the Secretary-General A/51/950, para 212.

32.2 Why have NGOs been able to move into a field which was for centuries the monopoly of a politico-diplomatic class? One of the consequences of globalization, with its speed of communication and easy access to information for all, has been to weaken States' monopoly on diplomacy. This has led to a parallel growth in so-called track two diplomacy,[2] carried out either by private individuals or NGOs, a form of diplomacy which 'has increased exponentially over recent decades'.[3] NGOs and other international bodies have 'revived the medieval right of non-sovereign entities to send and receive envoys, conduct negotiations and conclude agreements'.[4] The rise in importance of such bodies is partly a function of the way foreign policy, particularly among Western governments, is now less vertical and more horizontal in its interests. In other words governments pay increasing attention to issues like human rights and climate change, terrorism and nuclear non-proliferation rather than the purely territorial or geographical issues which were the more traditional stuff of diplomacy. It is also partly a question of the spread of literacy, the generation gap and 'counter culture' of the 1960s, and the popularity of pressure group politics. NGOs in countries with non-democratic or authoritarian regimes seek to influence government policies to reflect the people's needs, rather than what they regard as merely the wishes of the ruling elite, and this is relevant to foreign as well as domestic policies.

32.3 Communications, television in particular, have brought humanitarian crises direct to the homes of the public, thus mobilizing rapid support for action by government and by public subscription. The famine in Ethiopia in the late 1980s was brought vividly to the TV screen, picked up, and amplified by pop stars. The result was a mobilization of effort to bring relief. Similarly in that decade, skilful manipulation of communication and films of the clubbing of seal pups, accompanied by targeted NGO pressure on EU governments, led to an EU ban on the import of seal skins from Canada. More and more, NGOs will be on the front line in areas of conflict, not just providing much needed aid and medical assistance but bringing abuses and violations of human rights to world attention. Traditionally, NGOs working in such theatres were universally respected and enjoyed de facto protection. Increasingly this is no longer the case, and NGO

[2] As opposed to track one diplomacy by governmental or international organizations. See also Chapter **1**, paragraph **1**.24. 'Formerly known as "citizen diplomacy", mediation in an inter- or intrastate conflict conducted by any agency other than a state or an intergovernmental organization, typically by an NGO. The term was coined in 1981 by Joseph Montville, then a US diplomat. Track two diplomacy may be pursued on its own or in partnership with track one diplomacy, in which case it will form part of an instance of twin-track diplomacy.' G R Berridge and A James, *A Dictionary of Diplomacy* (Palgrave, 2001) 235.

[3] G R Berridge, *Diplomacy: Theory and Practice* (3rd edn, Palgrave, 2005) 200.

[4] R Cohen, 'Reflections on the New Global Diplomacy' in J Melissen (ed), *Innovation in Diplomatic Practice* (Macmillan, 1999).

workers are often attacked. This brings into sharp focus their relationship with any peacekeepers or troops present, as NGOs have always wanted to maintain their neutrality and impartiality. However combatants are less and less likely to respect this role and representatives of NGOs do not enjoy the privileges and immunities of diplomats. The relationship between NGOs and governments is therefore a complex and often symbiotic one which can to some degree compromise the formers' independence. As has been said, '[I]f civil society becomes state-sponsored, it ceases to be civil, and NGOs become quangos'.[5] But increasingly governments see the advantage of working with NGOs, particularly where their objectives match those of governments. The work of Amnesty International and Human Rights Watch in the human rights field is a case in point.

32.4 By contrast with the often ambivalent attitude of governments, the UN has since its inception sought to involve NGOs in its work.[6] International, regional, subregional, and national NGOs can claim consultative status where their programmes are of direct relevance to the aims of the UN. For instance, at present, more than 3,000 NGOs enjoy consultative status with ECOSOC (the UN Economic and Social Council, see Chapter **24**) in accordance with Article 71 of the UN Charter.[7] Similarly the right to participation of NGOs in the regular and special sessions of the Human Rights Council (paragraph **24**.17) was enshrined in the UN General Assembly resolution setting up the Council in 2006 and is a prerogative of NGOs enjoying consultative status with ECOSOC. NGOs play an important role in the work of UN human rights 'treaty bodies' such as the committees which monitor the implementation of the two Human Rights Covenants and the Committee against Torture (which monitors the Conventions against Torture). They supply the treaty bodies with information about human rights abuses and developments which enable the committees to verify or question the versions presented in governmental reports. While NGOs have different arrangements with different multilateral or international organizations, increasingly the latter involve and accommodate the former in their work (eg the Council of Europe, the African Union) with progressively closer relationships. For example, while ECOSOC and the ILO continue to use the term 'consultation' to

[5] E Mortimer, 'At arms length: Non-profit groups should not be beholden to governments', *Financial Times*, 22 March 1995.

[6] The Report of the Panel of Eminent Persons on Civil Society and UN Relationships recommends a still stronger relationship (11 June 2004, A/58/817).

[7] GA resolution 1996/31 lays down the arrangements for consultative status, and the principles to be applied in the establishment of consultative relations. Consultative status is granted by decision of ECOSOC on the recommendation of the standing Committee on Non-Governmental Organizations; decisions can be politically sensitive and are often adopted by vote.

describe their relationship with NGOs, the term 'participation' is becoming more common elsewhere.

32.5 It is now common for NGOs to be involved in preparations for international conferences.[8] The UN and its agencies are increasingly open to some form of participation by NGOs in conferences under their aegis. Issues as to rights of access, rights to receive information, and rights to speak or make proposals are often a major part of negotiations on a conference's Rules of Procedure. The 1998 Conference on the establishment of the International Criminal Court (Chapter **31**) provides an example of a fairly high level of NGO participation in a conference held under UN auspices. NGOs were entitled, for example, to attend the formal meetings of the main organs of the Conference and make limited statements at the opening and closing sessions. But they had no access to the informal meetings where all of the real negotiations took place. Any influence they had was exerted in lobbying delegations at the Conference or lobbying the relevant government in its capital. Another interesting feature of the Conference was that NGO experts (particularly international law academics) were seconded to government delegations, especially delegations from small developing States.[9] The inclusion of NGO experts in government delegations may thus have the purpose of assisting smaller governments which lack adequate resources. The rationale of other governments which include NGO representatives as part of their delegations may have both domestic and foreign policy roots. It may be at least in part to mute domestic criticism of a particular policy and perhaps 'to attract the support of a younger generation concerned with internationalist issues'.[10] It is also the case that mutual needs do not necessarily imply cooperative relationships.[11] Thus while NGOs will feel that their voice is being heard in the formulation of policy and their inclusion in delegations, with a consequently higher profile, they will also feel the need to retain distance and consequently their independence.

32.6 The role of most NGOs is not of course confined to the conference hall. They are more often in the front line in conflict areas (eg the work of Médecins sans Frontières in places like Darfur and Gaza) and in development. Oxfam for

8 For further reading on NGO participation in international conferences, see chapter 8 of A-K Lindblom, *Non-Governmental Organisations in International Law* (Cambridge: Cambridge University Press, 2005).

9 For example, the NGO 'Peace without Justice' implemented its Judicial Assistance Programme in this way, both at the conference and at the preceding negotiations in the Preparatory Commission.

10 D MacShane, 'The left-wing wizards of Oz', *The Guardian* 4 September 1995 quoted by Brian Hocking in 'Catalytic Diplomacy'.

11 B Hocking, 'Catalytic Diplomacy: Beyond "Newness" and "Decline"' in *Innovation in Diplomatic Practice*, edited by Jan Melissen (Macmillan, 1999).

instance has a world reputation for supplying clean water and sanitation. Moreover, some of the larger NGOs are far more than collectors and disbursers of money. Oxfam has a sizeable policy unit which covers areas as diverse as the implications of climate change and women's rights in Africa. NGOs regularly report on situations and lobby for improvements. Some NGOs, particularly those operating in the development field, will see themselves as essentially development diplomats, though NGOs will from time to time lack the capabilities for full economic rigour and therefore be criticized by those who, for example, point out that without investment in a secure environment we would be naive to believe that 'Oxfam can right all the world's ills—admirable as it and other NGOs may be'.[12] But the NGOs of course lack both the legitimacy which comes with official representation of a government or international organization like the UN and, more specifically, democratic legitimacy. In some cases they can be said to represent only narrow interest groups. Yet they fulfil an important role in what they do on the ground and for the causes which they champion, and are usually uninhibited in holding governments, both donors and recipients, accountable.

32.7 A notable exception to these general comments about NGOs is the International Committee of the Red Cross (ICRC), which with its headquarters in Geneva, is a hybrid NGO/intergovernmental organization.[13] Unlike true NGOs, the ICRC has observer status in the UN General Assembly (the other two anomalous organizations with humanitarian roles which also have this status are the International Federation of the Red Cross and Red Crescent, and the Sovereign Military Order of Malta). The ICRC has special privileges and legal immunities in many countries (it is represented in over 80) and it limits its committee members to Swiss nationals only. The ICRC has an exclusively humanitarian mission to protect the lives and position of victims of war and internal violence (including prisoners of war and those wounded on the battlefield) and to act as a guarantor and monitor of compliance of warring parties with the Geneva Conventions.[14]

32.8 It is worth noting that the UN and its agencies such as UNICEF and UNHCR have taken to appointing as 'good will ambassadors', stars from the world of entertainment and other celebrities, to focus world attention on problems as diverse as land mines, refugees, and reproductive health. The use of the traditional nomenclature of diplomacy is significant and the authority conferred by

12 C Patten, *What Next?* (Allen Lane, 2008) 210 and 265.

13 <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5W9FJY>.

14 Conventions governing the conduct of war and the treatment of prisoners and other non-combatants; the first was drawn up and signed in Geneva under the aegis of the Swiss government in 1864.

the UN Secretary General's blessing and in particular the name recognition of the individual is usually a powerful element in creating acceptance by governments.

32.9 What is the lesson for conventional ambassadors or other diplomats? Not that they have lost their role but that they no longer enjoy a monopoly as actors in the field of international relations. There are advantages to working constructively with NGOs. These include obtaining good information and avoiding criticism for non-cooperation. As we shall see in the next chapter, the field is an increasingly crowded one but the diplomat's aim remains the same: to advance and protect their government's interests, making use of all the tools under their control and as necessary bartering information and intelligence with other actors such as NGOs. It is futile jealously to guard one's turf but a diplomat will as always want to be cautious about sharing sensitive information with others. It would not be wise to share with an NGO information, even at a good exchange rate, which could be damaging or embarrassing to his or her government if it emerged into the public domain. An NGO has no obligation to protect the information it acquires. NGOs may certainly act in the diplomatic field, but when they are assisting governments they are doing so as auxiliaries to diplomats, that is to say as paradiplomats.[15] On other occasions they are acting as representatives of interest groups of civil society and thus, at their best, helping to remedy what may be a democratic deficit if negotiations are conducted at a purely governmental level.

[15] Keith Hamilton and Richard Langhorne in *The Practice of Diplomacy* (Routledge, 1995) 147 refer to paradiplomacy in the use by Woodrow Wilson of his friend, Colonel Edward House and of the intelligence officer, Sir William Wiseman, by the British for 'diplomatic' purposes during the First World War: 'Paradiplomacy on this scale was frustrating for an ambassador of Spring Rice's calibre and temperament'. Spring Rice was the British ambassador at Washington until January 1918. More recently, Tony Blair's use of Lord Levy in the Middle East during his premiership in a paradiplomatic role caused similar frustrations for the British ambassadors in the region.

A full definition is to be found in G Berridge and A James, *A Dictionary of Diplomacy*, online updating, <http://grberridge.diplomacy.edu/Teaching/display.asp?Topic=DictionaryN-R>

> **paradiplomacy.** (1) International activity (typically lobbying) by regional governments such as that of Quebec, and stateless nations such as that of the Kurds. Paradiplomacy of this kind is sometimes prefixed with one or other of the following adjectives: sub-national, sub-state, or regional. (2) The use by states of non-professionals—personal representatives and others without diplomatic status—instead or in support of the activities of their diplomats (sense 1). This sense is comparatively rare.

33

SECRET OR BACK-CHANNEL DIPLOMACY, RELIGIOUS DIPLOMACY, AND BUSINESS-ORIENTATED DIPLOMATIC ADVISERS

33.1 A single definition of secret diplomacy is hard to construct. Berridge describes it thus: 'In current usage "secret diplomacy" can mean keeping secret all or any of the following: the contents of a negotiation; knowledge that negotiations are going on; the content of any agreement issuing from negotiations; or the fact that any agreement at all has been reached'.[1] A corollary of this is often the secrecy of the identity of the person or persons involved in the negotiation. Successful instances of secret diplomacy include the negotiations to bring the Vietnam War to an end conducted by Henry Kissinger and Le Duc Tho in 1972 and 1973. By 1972, both sides in the Vietnam War were ready to compromise. The US was no longer insisting on the withdrawal of North Vietnamese forces from the South and the North Vietnamese were not demanding the replacement of the South Vietnamese leader Thieu with a coalition government. In this new situation, Kissinger and the North Vietnamese envoy Le Duc Tho negotiated in secret a peace agreement in October 1972. The Thieu government, however, denounced the agreement and Kissinger after President Nixon's re-election attempted to renegotiate it. This led the North Vietnamese to reject the proposed changes and to advance their own. Nixon decided to coerce the North by the so-called Christmas bombing campaign, the most intense campaign of the war. After eight days, the North Vietnamese agreed to sign an agreement much the same as that agreed upon in October. After a combination of carrot and stick, President Thieu also consented. On 27 January 1973, the Agreement on Ending the War and Restoring Peace in Viet-Nam was signed by the US, North Vietnam, South Vietnam, and representatives of the South Vietnamese communist forces.

[1] G R Berridge, *Diplomacy Theory and Practice* (3rd edn, Palgrave, 2005) 110.

33.2 Another example was the secret negotiation over the Oslo Accords in 1993. In 1992, after a Middle East peace conference in Madrid had made limited progress, the Israeli vice-minister of foreign affairs Yossi Beilin and Norwegian researcher Terje Rød-Larsen arranged a meeting in secret between the PLO representative Ahmed Qurei and an Israeli professor,Yair Hirschfeld, who met in a series of meetings in Oslo which was then taken over by senior officials sent by the then Israeli minister of foreign affairs Shimon Peres. The two delegations usually shared accommodation and meals while the Norwegian government dealt with the logistics and kept the meetings confidential, even providing a cover through the Norwegian Institute for Applied International Studies, Fafo. An agreement was reached in August 1993.

In both cases conventional diplomacy was in some respects acting as a front for the real negotiations. The Vietnam Peace Conference in Paris continued its weekly meetings while the real activity was going on elsewhere. The same was true of the Madrid peace negotiations and the Oslo Accords.

33.3 Secrecy is sometimes essential where disclosure of ongoing negotiations—particularly towards the final stages—could have an impact on financial markets. Active but discreet negotiations took place over 10 years to settle the 60-year-old dispute between the United Kingdom and the Soviet Union over claims for bonds and private property taken during the Russian Revolution and counter-claims for the British part in the intervention aimed at defeating the Revolution. They ended with the signature in 1986 by Sir Geoffrey Howe as UK Foreign Secretary and Eduard Shevardnadze, then Soviet Foreign Minister, of an Agreement[2] which in the words of *The Times* on the following day 'took the financial markets by surprise'.[3] On the day the Agreement was to be signed at noon, dealings in pre-1939 Russian bonds were suspended at the start of business on the London Stock Exchange. Although the bonds held by private claimants had not been honoured for 60 years many were in the hands of speculators and collectors as well as heirs to the original holders, and those who claimed eventually received a dividend of over 50% from Soviet assets—mostly the so-called 'Baring balances'—which passed to the United Kingdom under the Agreement .

33.4 Back-channel diplomacy, another phrase for secret diplomacy, was used in helping to bring the 'troubles' in Northern Ireland to an end. Since 1973, a Northern Irish businessman with strong links to the IRA, and Michael Oatley, his MI6

[2] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939, UKTS No 65 (1986).

[3] *The Times*, 16 July 1986.

officer, had maintained a channel of communication between the IRA leadership and 10 Downing Street, as Jonathan Powell, Mr Blair's Chief of Staff, revealed. 'It is very hard for democratic governments to admit to talking to terrorist groups while those groups are still killing innocent people. Luckily for this process, the British government's back channel to the Provisional IRA had been in existence whenever required from 1973 onwards.'[4] In other words, one of the advantages of back-channel diplomacy is its deniability, particularly appropriate when the other party is neither another government nor even an NGO, while another is the ability to talk to those with whom it is official policy not to engage in negotiation. The secret link was only used on three major occasions: to negotiate an IRA ceasefire in the mid-1970s; during the first IRA hunger strike in 1980; and in the early stages of the peace process in the 1990s. There are of course disadvantages, principally the irritation caused to those who are the visible face of the diplomatic process. These are often the same people who have to implement any agreement reached via the back channel. Much to his annoyance, the US Secretary of State, William Rogers, was kept in the dark by Henry Kissinger, President Nixon's National Security Adviser, over his negotiations with the Chinese on reopening relations for the first time since the Communist takeover.[5]

33.5 Given their spiritual and humanitarian concerns it is not surprising that religious bodies have been active in international relations for many years, even for centuries. The Quakers are a case in point. More recently, the Community of Sant'Egidio, which began in 1968 as a Roman Catholic lay organization focused on the poor of Rome, has since spread to be represented in 70 countries and has been active in bringing an end to the civil war in Mozambique and in mediation and conflict resolution in Lebanon, Algeria, Albania, Guatemala, and Kosovo.

33.6 Another recent manifestation of track two diplomacy has been the emergence of specialist consultancies on security matters that not only offer their business-orientated political analysis to companies and on occasion governments but will also mediate in areas where governments fear to tread. Control Risks is an example of a specialist risk consultancy that has engaged in activities such as negotiating ransoms for kidnapped businessmen, which have gone against the policies of most Western governments which refuse to pay ransoms and in some cases make doing so illegal.

[4] J Powell, *The Guardian* 18 March 2008.
[5] M MacMillan, *Seize the Hour, When Nixon met Mao* (John Murray, 2007) 178–86.

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Book IX

INTERNATIONAL TRANSACTIONS

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INTERNATIONAL CONFERENCES[1]

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34.1 An international conference is a meeting of State representatives for the discussion or settlement of questions of international concern, which may include meetings for the determination of political questions, or for the treatment of matters of a social or economic order. The term 'congress' was used in the past to refer to formal assemblies of Plenipotentiaries for the conclusion of peace and the redistribution of territory, as, for example, the Congress of Vienna (1814–15) after the Napoleonic Wars, the Congress of Paris (1856) after the Crimean War, and the Congress of Berlin (1878) for the settlement of affairs in the East, following the Russo-Turkish War. The term is now, however, entirely out of use, even for these purposes: cf, eg the Peace Conferences of 1919 and 1946–7 at the end of the two world wars, and, more recently, the Conference on Security and Cooperation in Europe (CSCE),[2] which met for some three years in the early 1970s.[3] The term 'conference' is now universally used to describe all international

[1] Permanent organizations having their own standing arrangements and rules of procedure, such as the United Nations and the Specialized Agencies, are treated as a separate subject in Book V. Cross-references to that Book have therefore been kept to a minimum.

[2] See Cmnd 6932 (1977) for the Final Act and other main documents, and a report on the Conference's outcome. The Final Act is also available at <http://www.osce.org/documents/mcs/1975/08/4044_en.pdf>.

[3] And retained a semi-permanent character thereafter. On 1 January 1995 its name was changed from 'Conference' to 'Organization': <http://www.osce.org/about/19298.html>.

assemblies in which matters come under discussion, whether with a view to settlement, with a view to arriving at particular agreements—by treaty or otherwise—which are designed to be binding on governments, or simply with a view to ventilating matters of concern or importance, or making recommendations to governments for action.[4]

34.2 Many of the functions served by international conferences, as described above, are nowadays equally capable of being performed either by a separate conference convened for a specific purpose or alternatively through the medium of a plenary gathering of the principal organ of an international organization. An intermediate solution, which is nowadays the most common, is for a conference to be convened by decision of an international organization, but to take place separately from the meetings of the organization itself.[5]

34.3 In earlier times conferences of the kind described above were ordinarily held at a neutral spot, or at some place expressly neutralized for the purpose of the meeting. There were often mediators, who presided over the discussions, whether carried on orally or in writing. Before the dissolution of the Holy Roman Empire in 1806, the principal representative of the Emperor discharged the functions of president. In the nineteenth century congresses and conferences were mostly held at the capital of one of the Powers concerned, and then the chancellor or minister for foreign affairs of that Power usually presided. On these occasions, besides the specially deputed Plenipotentiaries, the local diplomatic representatives of the respective Powers were also appointed as delegates.

34.4 Nowadays, although traces of the earlier practices remain, the usual pattern, where a conference is convened by an international organization, is for the decision on the seat of the conference, as well as other necessary details about its date, duration, participation in the conference, and the organizational arrangements, to be incorporated in the formal decision or resolution convening the conference, which will also include a statement of the conference's purpose or its terms of reference. This does not, however, exclude the possibility of a conference's being convened at the invitation of a particular government, or group of governments. In that event, the modalities just mentioned will have been established by agreement on the diplomatic plane in advance, and then incorporated in the invitation

[4] The Universal Postal Convention, however, continues to be revised periodically at *congresses* of the Universal Postal Union.

[5] Under Article 62.4 of the United Nations Charter, the Economic and Social Council is given an express power to call international conferences on matters falling within its competence, which it has made use of to convene important conferences on the environment and development (1972), hunger and world food (1974), population growth (1974), the role of women (1975), employment (1976), human settlements (1978), and science and technology (1979).

issued by the convening government, though it may be that some of them are left to be worked out by the conference itself in its initial stages.

34.5 The place of meeting of an international conference will be determined according to the pattern employed for convening it. An international organization convening a conference will often do so at its own permanent headquarters, but will sometimes be dependent on an offer from a Member State to act as host, to provide premises for the conference, and to meet at least part of the organizational and financial burden. In that event, the myriad details that arise to be regulated will be covered in a host country agreement concluded between the host government and the international organization, often following a standard model. Moreover, even where the idea behind the conference had been initiated by the international organization, it would be normal for a host government to assume for practical purposes the responsibilities of sponsor and convener;[6] and any government that does so will consider carefully the reasons which justify its involvement. Quite apart from any political considerations, the problems of finance, location, and accommodation, and notably nowadays those of security, may prove unexpectedly formidable, and the task of detailed advance planning may occupy many months. Where the conference is convened at the invitation of a State, its site will usually be the capital of that State. Sometimes the site is chosen on the basis that it is a convenient centre for all parties to meet, or to enable discussions to be carried on in a neutral atmosphere, or in seclusion away from either the glare of publicity, or protected from security threats or public demonstrations, (in which case, the place chosen may well not be a capital city).[7] For the revision or periodic review of a multilateral treaty, the place may be determined by the site of the former meeting, by a provision in the treaty itself, or by an understanding reached at the previous conference.

Invitations to a Conference

34.6 The issue of invitations to a conference will invariably be preceded by an exchange of views between the governments concerned, or at any rate those chiefly affected,

[6] For a characteristic contemporary example, see the statement by the Irish government as host to the Diplomatic Conference in May 2008 to adopt a new instrument of international humanitarian law prohibiting cluster munitions that cause unacceptable harm to civilians: <http://www.clustermunitionsdublin.ie/pdf/StatementonArrangements_000.pdf>.

[7] The face-to-face meetings between representatives of Israel and the Palestine Liberation Organization, which led to the Oslo Accords of 1993, were held under cover of a Norwegian research institute (Fafo); the Norwegian government covered the expenses, provided security, and were able to keep the meetings away from the public eye. The negotiation of a subsequent important appendage took place in a Paris hotel in the full glare of publicity, and the resulting agreement was signed in Washington. See also paragraph **33**.2.

and may in many modern cases also include non-governmental entities whose participation may be essential for the conference to achieve its purpose. In that event, and notably for example where the purpose of the conference is to deal with an internal, or mixed internal and external, armed conflict, or to resolve disputed claims to territory or statehood, the terms on which entities not yet recognized as States or governments are admitted to participate in the conference may be as delicate to settle as they are crucial to the likelihood of the conference succeeding. Questions of this nature aside, it is always desirable, if not indeed essential, that the scope of the intended conference should be determined in advance, so as to reduce the risk of the conference coming to grief when differences on this central issue prove insurmountable. Careful initial preparation can often enhance the likelihood of agreement being reached.

34.7 It is usual for the invitations to a conference to be accompanied by a draft of the proposed rules of procedure, specifying among other things the type of credentials required; the arrangements for observers; the main committee structure; the keeping of records; interpretation and translation; open and closed meetings; the working languages; and the system of voting to be used. Where the conference is convened by an international organization, the draft rules of procedure will have been produced and discussed within the framework of the organization, and then transmitted for formal adoption by the conference itself when it convenes. Similarly, an opportunity will be given for governments intending participation to contribute suggestions for the composition of the agenda, a final draft of which will need to be in the hands of participating governments considerably in advance of the date of the conference. All this presupposes the appointment of a secretariat on which the administrative work of the conference is to fall. If the conference is not convened by an international organization, the host government will have to make itself responsible for the provision of a secretariat.

Representatives

34.8 Normally, in the case of conferences of a non-political or technical character, diplomatic representatives are appointed as chief delegates and their delegations will include officials or persons having special knowledge of the subject or subjects to be discussed. The most senior representative of each participant will be designated the head of delegation, and will sometimes, for important conferences, be a minister or high official who attends only the opening and closing stages, leaving the detailed work under the charge of a deputy. The importance of the occasion, as well as the resources available to the individual participating governments, will dictate the size of their delegations, which often include legal or technical experts, secretaries, interpreters and translators, press

spokesmen, etc. If the agenda ranges over a wide or complex field, delegations may be of a considerable size, not only on the part of the host State. At the Third United Nations Conference on the Law of the Sea, which met for an extended period in the 1970s and 80s, the delegation of the United States had two joint heads and 15 alternate representatives, assisted by 15 Congressional advisers and their staff and a senator from Micronesia, 38 advisers representing the Departments of State, Commerce, Defense, Interior, Transportation, the Treasury, and numerous federal agencies, as well as experts on geography, cartography, navigation, international law, and international relations, and 26 technical experts in the fields of fisheries, petroleum, hard minerals, the marine environment, marine science, and maritime industries: a total of 112 delegates in all (excluding secretarial, administrative, and service staff).

34.9 A conference may be designated as an international Conference of Plenipotentiaries, in which case, as the name implies, the expectation would be that the heads of delegation or their representatives had been furnished with Full Powers[8] from the head of the State or the government they represent, empowering them to take part in the negotiations, and to conclude, subject if necessary to ratification, any treaty instrument which may result. Where a State appoints more than one Plenipotentiary, Full Powers may be issued to each, or their names may be included in a single document, authorizing them to act jointly or severally. The names of the members of each delegation will have been communicated in advance to the host government.

34.10 Whether or not they hold Full Powers, all delegates will require credentials, without which they will not be entitled to gain admission or to take part in the work of the conference. Credentials usually take the form of a letter from the responsible minister of the sending government, giving their names, titles, and functions, and specifying their capacity within the delegation, as may be required by the rules of procedure. A single letter of credentials covers all members of the delegation.

Languages at Conferences

34.11 Before the First World War, the language employed at an international conference was usually French, but since then practice on this question has undergone substantial changes. At the Paris Peace Conference of 1919, the Washington Conference of 1921–2, and at League of Nations conferences French and

[8] See paragraph **34**.10.

English had equal validity. For conferences convened under the auspices of an international organization it is now invariably the case that all of the official languages of the organization will be official languages of the conference, but that does not necessarily mean that they will all have the same status as working languages. The applicable rules on the question will form part of the rules of procedure, and will regulate, for example, the languages into which conference documents will be translated and the languages into and out of which interpretation will be provided. In the case of the United Nations and other organizations within the UN system there are six official languages: Arabic, Chinese, English, French, Russian, and Spanish. Within the European Union, on the other hand, the national languages of all Member States have equal status, a total of 23 in all.[9] Although English is now the language most commonly used at international conferences of all kinds, this is a matter of empirical practice only.

34.12 The development of modern equipment allowing for simultaneous interpretation of speeches has made the use of two or more languages much easier, but success depends on the quality of the interpretation.[10] The standard of simultaneous interpretation, which has always had a few exponents of legendary skill, is nowadays generally high, and the International Association of Conference Interpreters, with headquarters in Geneva, has helped to bring this about.[11] An international organization may have at its disposal its own staff of interpreters or translators,[12] though it is commonplace for the interpreters at least to be hired from outside for the occasion, or provided by the host government. The choice of equipment for interpretation and its proper functioning requires constant technical supervision, and its lay-out may impose limitations of its own on the premises suitable for conference use.[13]

The President of a Conference

34.13 An international conference is usually, but not always, presided over by the principal representative of the country in which it is held, if that country is a

9 Internally within the European Union, the language regime for the community institutions is determined by the Council (Article 290 of the consolidated version of the Treaties).

10 See Chapter **23**, paragraphs **23**.68–**23**.72.

11 There is a similar organization for conference translators, also with its headquarters in Switzerland. For a fuller description of the part played by interpreters, see R Roland, *Interpreters as Diplomats: A Diplomatic History of the Role of Interpreters in World Politics* (University of Ottawa Press, 1999).

12 With the benefit of modern methods of communication, it may sometimes be simpler and more effective for documents to be sent back for translation to the organization's headquarters.

13 And so may the security implications.

participant. Often this is the minister for foreign affairs or some other member of the government. There may on occasion however, depending on the way in which the conference was initiated, or on the political sensitivities affecting the particular subject matter, be a joint presidency held by more than one country, or a series of vice-presidents. The president's election may be moved by the representative of the country which comes first in alphabetical order, or by the *doyen d'âge,* or by some other representative specially chosen for the occasion, and will be a purely formal motion which the conference will be expected to accept by acclamation. The choice of president (and vice-presidents), as well as the main committee chairmanships and other offices, will in practice have been settled informally in advance.

34.14 The functions of the president of an international conference are to open the proceedings; to secure formal agreement to the rules of procedure, the committee structure and chairmanships, and other questions of procedure previously agreed to informally; to direct the course of the discussions throughout the formal proceedings of the conference proper; to control the final voting (if any); and ultimately to declare the conference closed. Frequently, however, the most important function of the presidency will be to bring its prestige to bear behind the scenes to cajole or persuade delegations to come to agreement on the most difficult points.

Ceremonial and Precedence

34.15 In the past a great deal of the work of a congress or conference might relate to the nice adjustment of matters of ceremonial and precedence. At the Congress of Nijmegen (1676–9) it is recorded that on the signature of the treaty of peace between France and Spain, two copies of the treaty having been prepared, one in French and the other in Spanish, and laid on the table at which the English mediators sat, the three French Plenipotentiaries entered by one door at the same moment as the three Spanish Plenipotentiaries entered at the other; they sat down simultaneously in exactly similar armchairs, and signed both copies respectively at the same instant.

34.16 Older rules about precedence among Plenipotentiaries have now been supplanted by the principle of equality between all delegations. Seating is normally arranged in alphabetical order, starting from the right of the president. Which delegation occupies the first place on the right of the president may be determined by arrangement or by lot. At a peace conference or its equivalent the representatives of the belligerent States may be seated in two opposite groups; often, however, the device of a 'round table conference' or some other special

seating arrangement is deliberately chosen to sidestep awkward questions of this kind.[14]

Procedure

34.17 It will frequently be the case that the main organ of the conference, having disposed of the formal opening business and conducted a general political debate, will adjourn; the substantive proceedings will then be remitted to a committee of the whole, under the control of which further committees may be set up to discuss particular items on the agenda, or sections of a draft instrument proposed for adoption by the conference. Sub-committees may be formed to deal with particular points and these in turn report back to the committee which appointed them. Apart from these, a small committee to examine the credentials[15] of the representatives is desirable, and a drafting committee of limited size to prepare the text of the treaty or other instrument resulting from the work of the conference is nearly always necessary.

34.18 Each of these committees will have its own chairman, and will often appoint a 'rapporteur', to prepare the report to be furnished to the parent body, who may or may not also be the chairman of the committee; the functions of the rapporteur are to summarize the conclusions arrived at by the committee and the discussions that led to them. The report is first submitted to the members of the committee, and the rapporteur is the mouthpiece of the committee in placing their report before the parent body.

34.19 Plenary meetings of the whole body of representatives take place from time to time as the work proceeds. The first plenary meeting is of an introductory character, for the election of the president, naming of the secretariat, framing of the lines on which the conference is to be organized, appointment of committees, etc. Thereafter plenary meetings are held as may be required, to receive and consider the reports of the committees. In a typical case, where the results of the discussions are embodied in a treaty, the culmination will be a final reading of a formal character, at the conclusion of which the finished result will be submitted for adoption by the conference, and incorporated in or appended to the Final Act of the conference, which will be signed at the concluding session by the heads of all delegations.[16] A Final Act of this kind is particularly common when the results of the conference are embodied in treaty instruments together with certain

[14] See Appendix II for some examples.
[15] See paragraph **34**.10.
[16] See also Chapter **37**, paragraphs **37**.5–**37**.11.

vœux or recommendations which do not themselves form part of the treaty texts adopted.[17]

34.20 At all important conferences the preparation of a record of the proceedings requires care. It used to be the practice for minutes (*procès-verbaux*) to be prepared by the secretary or secretaries on the occasion of each sitting, setting forth the date, hour, and place of meeting, the names of the Plenipotentiaries and their staffs, and the States represented. This would be followed by a statement of the deliberations carried on and the conclusions reached, and the hour at which the sitting closed. There would also be attached any draft proposals which might have come under consideration, declarations made, etc. The minutes would be signed by all the Plenipotentiaries present, and usually by the president and secretary-general or secretaries. Sometimes the minutes were read at the following sitting and adopted, but it was more usual first to submit proofs to the Plenipotentiaries for any necessary amendments, in which case the president would note the agreement at the next sitting and pronounce the adoption of the minutes, which would then be signed. The original would be preserved by the government of the State in which the conference was held, which would supply copies to the representatives of the others. In recent years, practice has become both less regular and less formal. There is generally a verbatim record, either stenographic or recorded on tape, from which the secretariat will be responsible for producing, often under the supervision of a rapporteur, a summary record for circulation to delegations. Participants may be given an opportunity of altering wording in the summary, but not the sense. Adoption of records by the conference and their signature by the president are unusual, although they are normally submitted to the delegations before being drawn up in final form. Drafts, declarations, etc are often circulated as conference documents and are not always appended to the daily record of proceedings.

34.21 In modern practice, the signatures to a treaty drawn up at a conference as the outcome of its deliberations are appended in the alphabetical order of the States represented.[18] But in the case of a treaty of peace the signatories on each side may be classed separately, as in the Treaty of Versailles and other treaties of peace resulting from the Paris Peace Conference of 1919. At the conclusion of the

[17] The Vienna Conference on the Law of Treaties, for example, adopted a Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, a Declaration on universal participation in the Vienna Convention on the Law of Treaties, a Resolution relating to Article 1 of the Convention, a Resolution relating to the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, and a Resolution relating to Article 66 of the Convention, all of which were annexed to the Final Act of the Conference.

[18] Within the EU, the alphabetical order follows the name of each Member State in its own language.

Second World War a different order was followed. For example, the Peace Treaty with Italy was signed first by the five Great Powers, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America, China, and France (in that order), then by the other Allied and Associated Powers, in English alphabetical order, starting with Australia and ending with Yugoslavia, and finally by Italy.

Codification of Procedures

34.22 Both the League of Nations and the United Nations have tried, without success, to codify in standard form the procedures to be followed at international conferences. It was one of the topics remitted to the League of Nations Committee of Experts for the Progressive Codification of International Law in the 1920s, but the work was deferred *sine die* in 1928. The subject was likewise looked at intermittently by the United Nations General Assembly in the 1980s but the work was again deferred without outcome.[19] The General Assembly did however draw up in 1979 a set of standard rules for Pledging Conferences, which would seem to have been beneficial in avoiding wasteful duplication.[20]

Participation in International Conferences

34.23 Questions not infrequently arise regarding the States to be admitted to take part in a conference. For the Paris Peace Conference, in 1919, it was finally determined, after lengthy discussion, to admit all those who had declared war on, or had broken off relations with, Germany, though the neutrals were to be allowed to take part in discussions which affected their special interests.[21] Since the Second World War, the question of the composition of a conference is one that has frequently arisen. For example, in the Berlin Communiqué of 18 February 1954, detailed provisions were made for the composition of the Geneva Conference.[22] During the Cold War, when the continued existence of divided States prevented the admission of either part to the United Nations and other organizations, a formula had to be found for general conferences which permitted sufficiently wide attendance, but avoided unacceptable conclusions being drawn over recognition. That particular problem is now largely a thing of the past.

[19] See R Sabel, *Procedure at International Conferences* (2nd edn, Cambridge: Cambridge University Press, 2006) 13–17.
[20] Ibid, 18.
[21] *History of the Peace Conference of Paris*, Vol 1, 247.
[22] See Appendix II.

Questions of a not dissimilar kind may now arise, however, in respect of the admission of 'Observers' to the Conference, which are dealt with in the next paragraph.

Observers

34.24 The creation of a category of 'Observers', with the right to attend a conference and to be present at most, if not all, of its meetings, but not to play a formal part in its work, eg by voting on proposals and decisions, is a device frequently resorted to as a way to side-step awkward questions of status, recognition, or participation.[23] So the status of Observer may be opened to: States not members of an international organization; international organizations; state-like entities not generally recognized;[24] other bodies with a special international status;[25] or even, in the context of particular international conferences, non-governmental organizations.[26]

The Secretariat

34.25 The principal secretary at a conference—often called its Executive Secretary—is usually an official of the country in which it is held, if that country is the convener of the conference, and the members of the secretariat are also often furnished by it, perhaps supplemented by others drawn from the permanent secretariat of an international organization. The secretariat comes under the control and authority of the president of the conference. For conferences convened by international organizations, it is invariably the case that a senior member of the organization's permanent staff will be designated as Executive Secretary of the conference. In such cases, the necessary services are normally provided by the secretariat of the organization concerned, supplemented possibly by the host State.

Note. Lists of the more important congresses and conferences from the middle of the seventeenth century onwards were given in the second edition of this work;

[23] Further details can be found in Sabel, *Procedure at International Conferences*.

[24] The Palestine Liberation Organization, for example, was granted in 1974 the status of a permanent observer in the UN General Assembly by GA resolution 3237 (XXIX) (later under the title of 'Palestine' following GA resolution 43/177 of 1988), and was subsequently granted the 'additional rights and privileges' set out in the Annex to GA resolution 52/250 of 1998, which applied as well to conferences convened under UN auspices. A similar arrangement had been followed for the Holy See from 1964, and was the subject of further enhancement in 2004 as set out in the Annex to GA resolution 58/314.

[25] Notably the International Committee of the Red Cross 'in consideration of the special role and mandates conferred upon it by the Geneva Conventions of 12 August 1949'; GA resolution 45/6 of 1990.

[26] See, in general, <http://www.un.org/esa/coordination/ngo/>.

and in his further treatise, *International Congresses*, the late Sir E Satow dealt more fully with those held since the beginning of the last century. None of this material is included in the present edition. But in view of certain peculiarities with regard to the way in which the respective Peace Treaties were negotiated and drawn up by the Paris Peace Conference of 1946, the Japanese Peace Conference of 1951, and the Geneva Conference of 1954, the notes on them which appeared in the fourth edition have been retained and are reprinted in an edited form in Appendix II of this book, supplemented by a section on the International Conference on the Former Yugoslavia of 1992–5.

35

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS—I GENERAL DEFINITION, MEMORANDUM OF UNDERSTANDING, TREATY, CONVENTION, AGREEMENT, PROTOCOL, DECLARATION, EXCHANGE OF NOTES, TREATY FORMALITIES, TREATIES IN MORE THAN ONE LANGUAGE[1]

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[1] Much useful material is nowadays to be found on the Foreign & Commonwealth Office's treaty pages, at <http://www.fco.gov.uk/en/about-the-fco/publications/treaties/practice-procedures>, notably in the paper Treaties and MOUs: Guidance on Practice and Procedures (hereinafter 'FCO Guidance'). The United Nations Office of Legal Affairs also publishes a Treaty Handbook containing similar material; it can be found at <http://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/TH/Page1_en.xml>.

General Definition

35.1 The most frequently cited definition of a treaty is that contained in the Vienna Convention on the Law of Treaties.[2] It defines the term 'treaty' as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[3] This definition is however expressly for the purposes of the Convention only. It consciously excludes, for example, international agreements concluded between States and international organizations or between international organizations themselves, and equally excludes international agreements not in written form, while providing at the same time that the omission of these cases is without prejudice to their legal force or to the application to them of the rules of international law.[4] Amongst the leading authorities, McNair uses the term 'treaty' to denote 'a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law';[5] while Reuter, at a higher level of generality, speaks of: 'une manifestation de volontés concordantes imputables à deux ou à plusieurs sujets de droit international et destinée à produire des effets de droit selon les règles de droit international'.[6]

Particular aspects of a general definition

1. Agreements involving international organizations and oral agreements

35.2 It is thus apparent that there is no single, all-embracing definition of the term 'treaty', and that the Vienna Convention, for all its great authority in the field, does not set out to provide one. The Convention is however now supplemented by a second Vienna Convention, of 1986, equally adopted on the basis of thorough and lengthy preparation by the International Law Commission, and

[2] Opened for signature on 25 May 1969; entered into force on 27 January 1980; 1155 UNTS 331. There are now 108 States Parties.

[3] Article 2.1(a). In formal terms, the Convention has no retroactive effect (Article 4); but for a brief analysis of how far the Convention represents a codification of existing customary international law: see I M Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984) ch I . The International Court of Justice has on repeated occasions recognized this effect for provisions of the Convention.

[4] Article 3.

[5] Lord McNair, *Law of Treaties* (Clarendon Press, 1961) 4.

[6] *Introduction au droit des Traités* (3rd revised edn, Geneva: ed Cahier, PUF, 1995) 26.

designed to regulate the treaties of international organizations, both those concluded between themselves and by them with States.[7] With the sole exception of the references to international organizations, the terms used in the 1986 Convention to define 'treaty' for its own purposes are substantially identical to those used in the 1969 Convention. It is thus possible to extract the following elements as central to a modern general definition of the term 'treaty': an *agreement*, of a suitably *formal character*, designed to give rise to *legal rights and obligations*, operating *within the sphere of international law*, and concluded between two or more parties possessing *legal personality under international law*. This should be read together with the fact that, whereas States are automatically endowed with treaty-making capacity, as an aspect of their sovereignty,[8] the extent to which a particular international organization will be competent to conclude treaties will be a function of its constituent instruments and other rules of the organization, based on the fulfilment of the organization's functions and purposes.[9]

35.3 It is also established that, although the overwhelming majority of transactions meeting these criteria will be recorded in writing,[10] there is no reason in law or practice why this must be the case.[11] The position is now beyond doubt, following the judgments of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case in 1933, and of the International Court of Justice in the *Nuclear Tests* cases (*Australia v France*, *New Zealand v France*) in 1974. In the first of these, the Court had to consider the legal significance of an oral declaration made by the Norwegian minister for foreign affairs to the Danish diplomatic representative, and concluded:

> '. . . that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.[12]

In the second, the Court attributed special weight to a series of statements by the president of the French Republic, and by the French ministers of defence and foreign affairs, made subsequent to the oral proceedings in the case, which,

7 But not yet in force, failing ratification by more than 28 of the requisite 35 States; 12 international organizations have however become parties to it. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=470&chapter=23&lang=en>.

8 Vienna Convention, Article 6.

9 Articles 1 and 6 and the Preamble to the 1986 Convention (n 7 above).

10 Though by no means necessarily in one single document.

11 McNair, n 5, 7.

12 PCIJ Series A/B, No 53, 71. (See also Chapter **2**, paragraph **2**.5.)

according to the Court, whatever the form in which they were expressed, must be held to constitute an engagement of the State having legal effect. In arriving at this conclusion, the Court said:

> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form.[13]

35.4 It should finally be noted that, so long as it evidences a clear indication of consent by the parties to be bound, it is not necessary for a treaty, even one in writing, to take the form of an instrument signed, and as the case may be ratified, by each of them. The Algiers Accords, which settled a series of questions in dispute between the United States and Iran following the revolution that deposed the Shah of Iran, takes the form of declarations made by the government of Algeria in which it records, as intermediary, 'the … interdependent commitments … made by the two governments', and to which were appended the terms of an escrow agreement between the United States government and certain banks.[14] In the case between Qatar and Bahrain on *Maritime Delimitation and Territorial Questions*,[15] the International Court of Justice found that separate exchanges of letters between the King of Saudi Arabia and the Amirs of Qatar and Bahrain, together with a document headed 'Minutes' and signed by the foreign ministers of the three States, were international agreements creating rights and obligations for the parties sufficient to establish the jurisdiction of the Court.

35.5 For practical purposes, therefore, neither agreements not in written form, nor treaties concluded by international organizations, nor treaties cast in a non-conventional shape, need be regarded as a special case when it comes to the application to them of the law of treaties. But several of the central elements set out above warrant further analysis.

2. Requirement that agreement should be governed by international law

35.6 First there is the requirement that the agreement should be 'governed by international law'.[16] This serves to distinguish a 'treaty' from other agreements which, although concluded between States or other subjects of international law, are

13 1974 ICJ Reports 267.

14 Texts available at <http://www.iusct.org/index-english.html>. A main purpose of the Accords was to establish a Claims Tribunal, which has since its foundation in 1981 presided over one of the largest claims settlement processes in history.

15 1995 ICJ Reports 6.

16 Operate 'within the sphere of international law' (McNair); or be intended to produce legal effects 'selon les règles de droit international' (Reuter).

regulated not by international law but by the national law of one of the parties (or by some other legal system chosen by the parties). An example would be a state contract concluded between the competent bodies of the Ruritanian and Utopian governments, whereby the latter agreed to supply the energy needs of the former through a gas pipeline on the basis of a standard form of contract used in the energy trade. Such a contract would not be a treaty and would not be governed by international law but by the terms of the contract itself supplemented, where necessary, by general principles of law. Other transactions of a private law nature, such as leases of land and buildings and loan agreements, may also be entered into between States; in such cases, it may be difficult to determine whether the parties intended the transaction to be governed by international law, or by general principles of law, or by a particular system of national law.[17] Conversely, it is perfectly possible for transactions between non-state parties, or between a State and a foreign private party, to be governed, by agreement, by international law, either on its own or as a supplement to the application of national law; this is very frequently the case for investment contracts, notably those concluded under the cover of bilateral treaties for the protection and promotion of investments.[18] The Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, concluded under the auspices of the World Bank, established a Centre, based in Washington, for the settlement of such disputes by conciliation or by arbitration, and provides (in the case of arbitration) that, in the absence of agreement, the tribunal shall apply national law 'and such rules of international law as may be applicable'.[19]

35.7 The requirement also serves moreover to distinguish a further category of international transactions which, although cast in writing and representing the result of an agreement arrived at between one or more governments, are nevertheless not intended to give rise to legal relations, ie to give rise to a set of binding rights and correlative obligations. Lacking this essential element, these instruments cannot properly be classed as treaties.

3. Instruments not intended to embody legally binding obligations

35.8 Not all instruments of an international character, however important they may be, are intended to be binding in law. For instance, no legal obligations were incurred through the Atlantic Charter of 14 August 1941, in which Franklin Roosevelt (for the United States) and Winston Churchill (for the United Kingdom) declared formally that they deemed it right 'to make known certain

[17] See F A Mann, *Studies in International Law* (Clarendon Press, 1973) 140–255.
[18] See <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.
[19] Article 41.2; see <http://icsid.worldbank.org/ICSID/>.

common principles in the national policies of their respective countries on which they base their hopes for a better future for the world'. Similarly, it is plain on the internal evidence that the Final Act of the Conference on Security and Cooperation in Europe[20] was not considered to amount to a treaty. The government of Finland is requested to arrange for the circulation of the Final Act as an official document of the United Nations, but it is specifically stated that the Final Act 'is not eligible for registration under Article 102 of the Charter of the United Nations', a further indicator of the fact that the States signing the Final Act did not consider that they were subscribing to a treaty instrument.[21] Another example is the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948,[22] which was followed by lengthy discussion to turn its provisions into legally binding form in the two International Covenants on human rights.[23]

4. Memoranda of Understanding

35.9 Modern practice is replete with cases in which the States drawing up an international instrument incorporating points of agreement between them make the deliberate choice not to clothe it in legally binding form.[24] Such instruments are very often entitled 'Memorandum of Understanding' (MOU), or are referred to as such, as a specific indicator of their non-binding character. The FCO Guidance summarizes the essential character of an MOU as follows: 'An MOU records international "commitments" but in a form and with wording which expresses an intention that it is not to be legally binding'. Whether the practice of recording commitments in MOUs is desirable or undesirable is a matter of debate, but various reasons may enter into the choice of the non-binding form over the treaty form. One might be the wish to avoid the publicity attendant on registration with the United Nations[25] or inclusion in a national treaty series, if for example the agreement deals with sensitive or secret matters, like nuclear technology, weapons production, intelligence cooperation, or joint action against terrorism. Another might be the wish to avoid having to submit the agreement to a process of formal internal approval before the national parliament. Yet another might be

20 See <http://www.osce.org/documents/mcs/1975/08/4044_en.pdf>.

21 See Chapter **39**, paragraphs **39**.52–**39**.53. The British prime minister in his address to the Conference on 30 July 1975, specifically stated that 'the Final Act of this Conference is not a treaty; nor is it a peace settlement' (Cmnd 6197).

22 GA resolution 217 (III).

23 For an account of the process, see Cassese, in P Alston, *The United Nations and Human Rights* (Oxford: Oxford University Press, 1992) 25–54.

24 See Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007) 32 *et seq*. For a more general treatment of this subject see Hillgenberg, 'A Hard Look at Soft Law' (1999) *EJIL* 499, and A Aust (1986) *ICLQ* 787.

25 See paragraphs **39**.52–**39**.53.

the simple preference for a commitment depending for its fulfilment more on political harmony and good faith than on the possibility of bringing formal claims in the event of a future breach.[26] Valid as these reasons may be—and indeed are—in particular cases, they can as easily be called into play to shore up less noble motives in other cases.

35.10 British practice in the drawing up of MOUs follows, as far as possible, a set terminology in order to distinguish MOUs from treaties. Standard terminology for use in MOUs can be found in the FCO Guidance: for instance, use 'governments' or 'participants', not 'parties', 'provisions' not 'terms' and 'will' not 'shall'. MOUs are expressed to 'come into operation' or 'effect', while treaties 'come into force'. An MOU, and any exchange of Notes confirming it, should record the 'understanding' of the governments concerned in the matter, not their 'agreement'. If this terminology is followed, it will generally be plain that the intention is not to create legally binding rights and obligations.[27]

35.11 Many other States are similarly consistent in the use of particular terminology. Confusion has however been caused by the fact that the practice of the United States, in particular, has been less consistent, with the result that the US has regarded some instruments as treaties which other States would regard as MOUs.[28] It is of course possible to provide expressly to the effect that the instrument is not legally binding,[29] but this is not commonly done, and the absence of such a provision would not on its own be conclusive.

35.12 The fact that an MOU is not legally binding does not however mean that entering into one entails no commitment; as indicated above, the commitment is one of a policy rather than a legal kind, and issues of good faith and reputation are just as much at stake in the one case as in the other. The MOU form can thus in practice be used, not simply for mundane exchanges on technical subjects, but

[26] As explained in the FCO Guidance (n 1.) '[An] MOU is used where it is considered preferable to avoid the formalities of a treaty—for example, where there are detailed provisions which change frequently or the matters dealt with are essentially of a technical or administrative character; in matters of defence or technology where there is a need for such documents to be classified; or where a treaty requires subsidiary documents to fill out the details.'

[27] At the Vienna Conference on the Law of Treaties, the United Kingdom representative maintained that 'many agreed minutes and memoranda of understanding were not international agreements subject to the law of treaties, because the parties had not intended to create legal rights or obligations, or a legal relationship, between themselves'. He also pointed out that 'international practice had consistently upheld the distinction between international agreements properly so-called, where the parties intended to create rights and obligations, and declarations and other similar instruments simply setting out policy objectives or agreed views'. *Official Records. Second Session* (1969) 228.

[28] There is a discussion of this question in the Tribunal's Award in the *Heathrow User Charges Arbitration (US v UK)*, 102 ILR 215, at 351 *et seq*.

[29] See the examples in paragraph **35**.8 above.

as the vehicle for commitments of considerable importance, for example projects for the joint development or procurement of sophisticated weapons systems involving substantial investment. So MOUs have also been concluded in recent years with a number of countries in the Middle East and North Africa intended to facilitate the deportation or extradition of terrorist suspects by providing assurances about their treatment on return to their home country sufficient to meet the United Kingdom's human rights obligations. Whether the vehicle is in fact sturdy enough to carry this weight of freight has been cast into doubt in national courts. A national court, faced with a question (arising for example out of legislation on human rights) as to whether another State can be relied upon to uphold its commitments, might well take an adverse view of the fact that the State was not willing to give those commitments legal form. How far this kind of assurance may be relied upon, given conditions in the receiving countries, has been the constant subject of challenge in British courts, with varying results, and the possibility of further recourse to the European Court of Human Rights.[30]

35.13 Nor does the absence of legal obligation mean that an MOU is devoid of legal consequences. The principle that States must conduct their dealings with each other in good faith may have the effect that a State is estopped from going back on the terms of an MOU where the other State has acted in reliance upon them, though this is still a developing area of international law.

5. Questions of form and terminology

35.14 'Terminology' refers here to the title given by the parties to their treaty, and 'form' to its formal structure. Although the question of terminology was once the source of much confusion, it is now well established that the title given to a treaty instrument is entirely a matter of the free choice of the parties, and has no bearing on the legal quality of the instrument or on the application to it of the law of treaties. The Vienna Convention definition cited above[31] makes this explicit by providing in terms that it applies to all such agreements whatever their particular designation. Conversely, the title given to an instrument, although it may be a strong indicator of the intentions of the parties drawing it up, is not in itself conclusive of the status of the instrument, which would have to fulfil in substance the criteria listed above[32] in order to rank as a treaty. Although Article 102 of the United

[30] The ECHR recently found inadequate a flimsy arrangement between Italy and Tunisia, *Saadi v Italy*, 28 February 2008. For a recent UK decision by the House of Lords, see *RB and Anor (Algeria) v Home Sec*, and *OO (Jordan) v Home Secretary* [2009] UKHL 10 at paras 106–26, in which Lord Phillips sets out the approach to be taken where assurances given by a foreign State are challenged.

[31] Paragraph **35**.1 above.

[32] Paragraph **35**.2 above.

Nations Charter, when laying down the obligation of registration,[33] uses the dual terminology '[e]very treaty and every international agreement', the term 'treaty' may be taken as having the broadest generic scope, and is equally apt to cover those written instruments or series of instruments designated as a treaty, convention, agreement, protocol, covenant, charter, statute, act, declaration, concordat, exchange of Notes, exchange of letters, *modus vivendi*, and others besides. It may also, depending upon the intention of the parties, cover agreed minutes and (subject to paragraphs **35**.9–11 above) memoranda of understanding.

35.15 A rationalization of the terminology employed in international practice to describe treaty instruments is difficult to attempt, and hardly seems profitable. So far as trends are discernible at all in modern practice, it might be said that 'treaty' and 'convention' tend to be invested with the most solemnity, the former being frequently (but by no means exclusively) employed for bilateral engagements and the latter (but again by no means exclusively) for general multilateral engagements; whereas 'statute' is most commonly reserved for the constitutive instruments of international organizations. But any statement of this kind is subject to so many exceptions as to let it serve as no more than the most general guidance, and then of a purely descriptive character. It would nevertheless appear that the most frequently utilized designations for treaty instruments are treaty, convention, agreement, exchange of Notes, protocol, and declaration.

35.16 In this chapter, it is proposed to deal with these six types of treaty instrument, and in Chapters **36** and **37** with various other types of treaty instrument which would normally fall within the definition of a treaty: eg Pact, Constitution, Charter, Statute, Regulation, Concordat, Additional Articles, Act, General Act, Final Act, *Modus Vivendi*, and *Compromis* (Special Agreement).

Treaties

35.17 Of those international instruments which are clearly intended to have an obligatory or binding character, many of the most significant bear the title 'treaty'. The word 'treaty' is derived from the French word *traiter,* which means to negotiate. The comment to Article 1 of the Harvard Draft Convention on the Law of Treaties states that 'in the literature of diplomacy and international law the term "treaty" is employed in both a general and a restricted sense'. In the general sense, it 'embraces a great variety of instruments to many of which other names than "treaty" are given, although there is seldom if ever any juridical distinction between them'.

[33] See Chapter **39**, paragraphs **39**.52–**39**.53.

The definition of the term 'treaty' in the Vienna Convention is of course based on this general sense. But the designation 'treaty' in the restricted sense refers to the formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves; and it is this restricted sense of the term 'treaty' which must now be considered.

35.18 Generally speaking the designation 'treaty' has been reserved for international agreements of a particularly significant character, for example treaties of peace or alliance. The designation 'treaty' may also be employed to mark the political importance of the particular international agreement—as for example the North Atlantic Treaty of 4 April 1949,[34] and all of the treaties establishing, first, the European Communities and then the European Union,[35] as well as the treaties providing for the accession of new Member States to them.[36] It was once the case that treaties in this restricted sense were always concluded between heads of state; but modern practice demonstrates that treaties can be concluded in heads of state form, in interstate form, or in intergovernmental form. The choice of form may depend in part on the political importance of the treaty and in part on the constitutional requirements of the Contracting Parties; otherwise it is not possible to discern any general principle governing the choice between these forms, although the following illustrations of practice may be given.

35.19 Treaties between heads of state are still concluded. The European Community and European Union Treaties are cast in this form, as are the accession arrangements for new Member States.[37] The form has virtually died out, however, for bilateral treaties; the last example in British practice appears to be the Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, with an Exchange of Letters, done at Canterbury on 12 February 1986.[38]

35.20 A treaty concluded in heads of state form can be broken down into the following parts:

1. The preamble, beginning with (a) the names and titles of the High Contracting Parties; (b) a summary of the object and purpose of the treaty; (c) the names

[34] 34 UNTS 244.

[35] Texts available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding>; subsequent modifications of these constitutional instruments have, however, not always been entitled 'Treaty', eg the Single European Act of 1986.

[36] The accession instruments typically include an 'Act of Accession', which sets out the detailed provisions, but it forms an annex to the Accession Treaty; texts available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding>.

[37] See further Chapter 37, paragraph 37.1.

[38] Treaty Series No 15 (1992) Cm 1827.

and official designations of the Plenipotentiaries appointed by the High Contracting Parties;[39] (d) a paragraph stating that the Plenipotentiaries have produced their Full Powers, which were found to be in good and due form, and that they have agreed upon the following articles.

2. The various substantive articles of the treaty, which may begin with a definitions article and will then normally be followed by general provisions, more specific provisions and, finally, any provisions laying down the means of executing the general and specific provisions.[40]
3. A series of articles generally known as the 'final clauses' which deal with such matters as the territorial application of the treaty, signature, ratification, accession, entry into force, amendment, denunciation (withdrawal), and duration. In the case of a multilateral treaty, there may also be a reservations article. The provision for ratification usually mentions the place for the exchange or deposit of instruments of ratification, whilst the clause dealing with duration may specify that the treaty shall remain in force indefinitely, or for a fixed number of years, or for successive fixed periods unless notice of termination is given by a specified time.
4. A clause (*testimonium*)[41] stating 'In witness whereof . . . ('En foi de quoi . . .') the respective plenipotentiaries have signed this Treaty'.[42]
5. Locality and date ('Done at . . . the . . . day of . . . , ...').
6. Seals and signature.

35.21 Treaties between States (ie in interstate form) are now much more frequent. The North Atlantic Treaty of 4 April 1949, the Treaty of Peace with Italy of 10 February 1947,[43] and the Treaty of Peace with Japan of 8 September 1951[44] were all concluded between States rather than between heads of state. The Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 is another example of an important multilateral treaty concluded in interstate form. Recent bilateral treaties concluded by the United Kingdom in interstate form include the Treaties on Extradition, and on Judicial Assistance in Civil and Commercial Matters, concluded with the United Arab Emirates on 6 and 7 December 2006 respectively.[45]

[39] Though this is no longer invariably the case, especially for general multilateral treaties.

[40] This order is, however, by no means sacrosanct. The definitions article (if any) is sometimes relegated to the end; and, where the treaty sets up an organization or mechanism to ensure effective execution of its provisions, the organizational or procedural provisions may precede the more specific substantive provisions.

[41] Formerly, all of the parts of the treaty would have been known by technical terms in Latin; of these, *testimonium* is the only one that remains in common use.

[42] Formerly, the words used would have been 'have affixed their signatures and seals', but, the use of personal seals having become obsolete, the simplified formula above is now common.

[43] 49 UNTS 126.

[44] 136 UNTS 49.

[45] Treaty Series No 6 (2008) Cm 7382; Treaty Series No 1 (2009) Cm 7535.

35.22 Treaties between States are rather less formal in their terminology than treaties between heads of state.[46] In place of the term 'High Contracting Parties', the expression 'Contracting Parties' or 'Contracting States' (or sometimes simply 'the Parties' or 'the States Parties')[47] is used. The preamble may also be reduced in length by the omission of one or other of the formal elements usual in the preamble of a treaty concluded between heads of state. It is, however, customary, even in the case of a treaty between States, to retain in the preamble a statement of the object and purpose of the treaty.

35.23 Treaties between governments are also less formal. The parties normally refer to themselves as the 'Contracting Governments' or the 'Contracting Parties', although occasionally one may come across the use of such terms as 'Signatory Governments' or 'Participating Governments'. Again, however, the preamble will usually contain a statement of the object and purpose of the treaty.

Conventions

35.24 The designation 'convention' tends to be utilized for multilateral treaties of a law-making type. Illustrative of this tendency are the various Hague Conventions emanating from the First and Second Hague Peace Conferences (of 1899 and 1907 respectively) and the various conventions concluded since the Second World War as a result of the process of progressive development and codification of international law being pursued within the framework of Article 13 of the United Nations Charter. Examples are the Vienna Convention on Diplomatic Relations of 18 April 1961,[48] the Vienna Convention on the Law of Treaties of 23 May 1969,[49] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973,[50] the United Nations Convention on the Law of the Sea of 10 December 1982,[51] and the Convention against Torture and Other Cruel,

[46] Occasionally, one may come across a treaty which is in 'mixed' form. Thus, the Treaty of Versailles of 28 June 1919 is expressed to be concluded between the 'Principal Allied and Associated Powers' and Germany, but the High Contracting Parties (on the Allied side) are the various heads of state 'represented' by certain ministers and ambassadors. This formula was probably chosen for the purpose of enabling the British self-governing Dominions and India to participate separately in the Peace Treaty without raising what would have been regarded at that time as difficult questions of their treaty-making capacity: see McNair, n 5, 16.

[47] Some casual modern usage tends to refer to 'State Parties' (with State in the singular) but this is incorrect, and should be avoided as it can raise a misleading inference that there exist other categories of parties.

[48] 500 UNTS 95.

[49] *Misc,* No 19 (1971), Cmnd 4818.

[50] 1035 UNTS 167.

[51] 1833 UNTS 3 (likewise the four earlier conventions on the law of the sea of 29 April 1958).

Inhuman or Degrading Treatment or Punishment, of 10 December 1984.[52] A similar practice had been followed by the League of Nations, as, for example, with the Barcelona Conventions of 1921 and the Slavery Convention of 1926. Law-making or regulatory treaties concluded under the auspices of one or other of the Specialized Agencies of the United Nations will also normally take the form of conventions: examples are the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970,[53] and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971[54] (both negotiated within the framework of the International Civil Aviation Organization (ICAO)). Treaties which are constitutive of international bodies of a technical character may also take the form of conventions—for example, the Universal Postal Convention, the International Telecommunications Convention, and the various conventions for the protection of intellectual property.

35.25 The Council of Europe may be rare in maintaining a carefully ordered practice in this regard, namely:

> Once a "Convention" or an "Agreement" is concluded, they have the same legal effect. The only distinguishing feature is the form in which a State may express its wish to be bound by one or the other. While a European Convention is usually the object of the deposit of an instrument of ratification, acceptance or approval, a European Agreement may be signed with or without reservation as to ratification, acceptance or approval. Moreover, the model final clauses adopted by the Committee of Ministers in 1963 and revised in 1980 contain clauses regarding the procedure whereby non-member States of the Council of Europe may become Parties to European Conventions or Agreements; in principle, these clauses enable them only to accede.[55]

35.26 However, it must not be thought that the designation 'convention' is used only for multilateral treaties of a law-making or normative type. The designation is also used for a wide range of bilateral treaties, in the fields, for example, of extradition, double taxation, and judicial cooperation.

Agreements

35.27 The term 'agreement', like the term 'treaty' itself, is used in a number of senses. In a generic sense, it covers any meeting of minds—in this case, the minds of two

[52] 1465 UNTS 85.
[53] 860 UNTS 106; <http://www.icao.int/icao/en/leb/Hague.pdf>.
[54] 974 UNTS 178; <http://www.icao.int/icao/en/leb/mtl71.pdf>.
[55] See <http://conventions.coe.int/general/v3IntroConvENG.asp>.

or more international persons. But, as has already been stated, a distinction must always be drawn between agreements intended to have an obligatory character and agreements not intended to have such a character. In its restricted sense, the term 'agreement' means an agreement intended to have an obligatory character, but usually of a less formal or significant nature than a treaty or convention. Like treaties and conventions, agreements in this restricted sense may be concluded between heads of state, between States, or between governments.

35.28 The treaty instrument in the form of an 'agreement' is, as it were, the workhorse of the treaty-maker. While it can be used for multilateral treaties—for example, the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty of 19 June 1951[56]—it is more commonly used for bilateral treaties of a fairly routine nature. It may be noted here that bilateral treaties concluded between the United Kingdom and other Commonwealth countries usually take the form of 'agreements' and are expressed to be concluded as between governments rather than as between heads of state or as between States.[57]

35.29 Sometimes agreements are concluded between a government department in one country and a government department in another. It depends on the circumstances whether such 'interdepartmental agreements' amount to treaties binding under international law or not.[58]

Protocols

35.30 The term 'protocol' derives from the Low-Latin *protocollum,* itself deriving from a word in the original Greek meaning the 'first glued-in' to a book—that is to say, a summary or digest of the contents. In diplomacy, it gradually came to mean the register in which the minutes of a conference were held. It is, of course, also employed in diplomacy to signify the forms to be observed in the official correspondence of the minister for foreign affairs and in the drafting of diplomatic documents such as treaties, full powers, letters of credence and recall, etc. Finally, it has come also to embrace the concept of something which is added to a treaty in order to perfect or complete the treaty. The word 'protocol' may accordingly, depending upon the context in which it is used, signify 'an addition to a treaty, a summary of official proceedings or a technique of the proper method of doing things, including official etiquette'.[59] In this last very broad sense, the word will,

[56] 199 UNTS 68.

[57] eg the Agreement with the Government of Ghana on the Transfer of Prisoners, Treaty Series, No 11 (2008), but MOUs are also in frequent use.

[58] See paragraph **35**.6.

[59] D P Myers, 'The Names and Scope of Treaties' (1957) 51 *AJIL* 575, 586.

of course, cover such matters as protecting sensitive national dignities on major occasions and the practical arrangement of even informal occasions where there might well be difficulties if no rules existed.[60]

35.31 When used in the sense of a treaty instrument, the designation 'protocol' usually refers to a single instrument which amends or supplements an earlier international agreement. The designation 'protocol' may also be given to a treaty instrument which is ancillary to a treaty or convention, although concluded simultaneously. Thus there were 30 separate protocols annexed to, but forming an integral part of, the treaties providing for the accession of Denmark, Ireland, Norway, and the United Kingdom to the EEC and EURATOM in 1972, and nine such protocols are annexed to the treaties providing for the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia to the EU in 2003.[61]

35.32 Compulsory dispute settlement provisions are frequently put into a separate protocol, so that their acceptance can be made optional. Thus there are Optional Protocols on the Compulsory Settlement of Disputes to the Vienna Conventions on Diplomatic Relations and Consular Relations and the Convention on Special Missions.[62] The right of petition to the European Court of Human Rights was originally optional, and governed by a separate protocol, but has since 1998 been an integral part of the Convention on Human Rights and Fundamental Freedoms, following its amendment by Protocol No 11.[63]

35.33 The term 'protocol' may also be given to a treaty instrument which prolongs the duration of a treaty or convention that is about to expire. Examples are the Protocol for the Continuation in Force of the International Coffee Agreement, 1968, as extended,[64] and the Protocol of 15 January 1967,[65] for the extension of the period of validity of the Convention on the Declaration of Death of Missing Persons.

35.34 In its secondary sense of a summary of official proceedings, the term 'protocol' has much the same meaning as the minutes of a conference, and has been used as the vehicle to record, on the conclusion of a multilateral treaty or convention,

60 See especially Chapters **3**, **9**, **14**, and **40**.

61 See <http://eur-lex.europa.eu/en/treaties/index.htm#accession>.

62 The Optional Protocol to the Consular Relations Convention has recently provided the jurisdictional base for a series of important judgments of the International Court of Justice in cases brought against the USA by Paraguay, by Germany, and by Mexico.

63 See <http://conventions.coe.int/Treaty/en/Summaries/Html/005.htm>.

64 982 UNTS 332.

65 588 UNTS 290.

observations, declarations, and ancillary agreements relating to the text or to its interpretation.[66]

35.35 Agreements between governments in regard to some particular matter are sometimes styled 'protocols', though differing in no other respect from other agreements. The form has been used to conclude an armistice (Protocol between the United States and Spain of 12 August 1898;[67] and between Poland and Lithuania of 29 November 1920);[68] to provide for the delimitation of a boundary (Protocol concerning the delimitation and marking of the Argentine–Uruguayan Boundary Line in the River Uruguay of 16 October 1968);[69] to re-establish diplomatic relations (Protocol between the Netherlands and Venezuela of 20 August 1894);[70] to regulate the status of international military headquarters (Protocol of 28 August 1952, between the Parties to the North Atlantic Treaty);[71] and to regulate the exercise of criminal jurisdiction over UN armed forces (Protocol of 26 October 1953, between Japan, the United States, Australia, Canada, and the United Kingdom).[72] There is a Protocol on Arbitration Clauses, signed at Geneva on 24 September 1923, concerning the recognition and enforcement of certain arbitration agreements and arbitral awards.[73] Finally, mention should be made of the important Geneva Protocol of 17 June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[74]

35.36 It is, however, correct to say that the protocol is now used principally as an instrument subsidiary to a treaty or convention, usually (but not necessarily) drawn up by the same negotiators, and dealing with ancillary or incidental matters such as the interpretation of particular articles of the main treaty or any supplementary provision of a minor character. Ratification of the treaty or convention[75] will normally *ipso facto* involve ratification of any supplementary or additional protocol of this nature. In 1993 the English Divisional Court held, with reference to

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66 Nowadays however items of that kind would be recorded in the Final Act of the Conference (see Chapter **37**, paragraphs **37**.5–**37**.11) or in the records of an international organization when it formally adopts the treaty text and opens it for signature (cf UNGA resolution 59/38, adopting the United Nations Convention on Jurisdictional Immunities of States and Their Property, which formally took into account a statement by the Chairman of the relevant Committee recording certain working understandings relating to the text, which were then annexed to the Convention).

67 *British and Foreign State Papers (BFSP),* Vol 90, 1049.

68 Ibid, Vol 114, 875.

69 671 UNTS 57.

70 *BFSP,* Vol 86, 543.

71 200 UNTS 340.

72 207 UNTS 237.

73 27 UNTS 157.

74 Available at <http://www.icrc.org/ihl.nsf/FULL/280?OpenDocument>.

75 See Chapter **38**, paragraphs **38**.1–**38**.19.

the Maastricht Treaty, that ratification of the Treaty 'will automatically involve' ratification of the Protocols to it.[76] Where the protocol is concluded independently at a later date (as, for example, an amending protocol), it will of course be subject to independent ratification.

35.37 Alternatively, the protocol form may be used as the means for subsequently adding to or expanding, sometimes in a significant way, the terms or scope of an earlier treaty, as in the case of the three Additional Protocols to the Geneva Conventions of 12 August 1949 on the protection of victims of armed conflict (Red Cross Conventions).[77]

35.38 An interesting special case is the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 10 October 1980,[78] which is drawn up as a framework convention for the separate regulation of particular weapons through individual protocols. Three such protocols are annexed to the Convention itself, and two have been adopted since, one on blinding laser weapons,[79] and one on explosive remnants of war.[80]

Declarations

35.39 Oppenheim places declarations, whether made by a single State or several States, under a general heading of 'unilateral acts', since any legal significance they may possess is not dependent on the response of an addressee. Sometimes however a declaration, 'perhaps for reasons of dignity', as Oppenheim puts it, is just a treaty or convention by another name. A particularly good example is furnished by the Joint Declaration of China and the United Kingdom on the Question of Hong Kong of 1984, where it may be that the studiously neutral title was chosen in order to bridge the fundamental gap between the legal views of the two parties as to British authority over Hong Kong. Although its terms were largely written into the Basic Law of the Hong Kong Special Administrative Region on the territory's restoration to China, the Joint Declaration undoubtedly establishes legal rights and obligations, sounding in international law, between the

[76] Citing in support the previous edition of the present work; *R v Secretary of State for Foreign & Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552 at 564G.

[77] The Protocols deal, respectively, with the amendment of the rules relating to international armed conflict, with the adoption of new rules relating to non-international armed conflict, and with the adoption of a further distinctive emblem alongside the Red Cross and Red Crescent; texts of the Conventions and Protocols at <http://www.icrc.org/ihl.nsf/FULL/610?OpenDocument>.

[78] 1342 UNTS 137.

[79] Vienna, 13 October 1995; <http://www.icrc.org/ihl.nsf/FULL/570?OpenDocument>.

[80] Geneva, 28 November 2003; <http://www.icrc.org/ihl.nsf/FULL/610?OpenDocument>.

two States, and was registered as such with the United Nations Secretariat on 12 June 1985. Similar considerations may however apply to multilateral instruments as well, like the Declaration of Paris of 1856,[81] which aimed at defining the rules of international law relating to blockade and contraband. Other law-making (or law-declaring) declarations are the Declaration of St Petersburg of 1868 (explosive bullets),[82] the (unratified) Declaration of London of 1909 (blockade and contraband),[83] and the Barcelona Declaration of 1921 recognizing the Right to a Flag of States having no Sea-Coast.[84] But declarations are not confined to law-making treaties; the Declaration on the Neutrality of Laos signed at Geneva on 23 July 1962,[85] contains a number of specific undertakings by the signatory governments and, in accordance with its terms, is to be 'regarded as constituting an international agreement'.

35.40 It may sometimes be difficult to determine whether an instrument which is styled a declaration amounts to a treaty rather than a pronouncement of policy expressive of a shared or common purpose. The Declaration by the United Nations of 1 January 1942[86] should almost certainly be regarded as a treaty, since acceptance of the Declaration was a condition of original membership of the United Nations. On the other hand the type of instrument which became increasingly common during the Second World War (and has persisted to this day), namely, a declaration published after a conference of three or four heads of state,[87] presents rather special features. The contents of a declaration of this kind may be partly agreements to do or not to do something, and partly statements of common policy; accordingly, it is unsafe to generalize on how far declarations of this somewhat unorthodox nature may constitute treaty instruments.[88]

35.41 Secondly, under the general heading of unilateral acts, unilateral declarations are undoubtedly capable of creating rights and duties for other States.[89] One would previously have listed among these: declarations of war, declarations on the part of belligerents concerning the goods they will condemn as contraband, declarations at the outbreak of war on the part of third States that they will remain neutral. Present-day practice is less amenable to a listing of this kind. The International Law Commission had the subject under study from 1996 to

81 *BFSP,* Vol 46, 63.
82 <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.
83 <http://www.icrc.org/ihl.nsf/FULL/255?OpenDocument>.
84 7 LNTS 73.
85 Treaty Series No 27 (1963), Cmnd 2025.
86 *Yearbook of the United Nations* (1946–7) 1.
87 Such as the conferences which took place at Yalta and Potsdam in 1945.
88 McNair, 23, n 2.
89 See the examples cited at paragraph **35**.3 above.

2006 and reported in terms of general 'Conclusions', to the effect that 'formal declarations formulated by a State with the intent to produce obligations under international law', and publicly made, may have the effect of creating legal obligations, the binding character of which is based on good faith.[90] The Commission went on to say that a unilateral declaration entails obligations for the formulating State only if it is expressed in clear and specific terms, and that, in the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner'.[91]

35.42 Thirdly, the term 'declaration' is used to describe the action taken when States communicate to other States, or *urbi et orbi,* an explanation and justification of their policy or conduct, or an explanation of their views and intentions.[92]

35.43 Declarations of these second or third types, whether they give rise to legal obligations or not, do not constitute treaties as such.

35.44 In the *Ambatielos* case[93] the International Court of Justice held that a Declaration annexed to the Treaty of Commerce and Navigation between Great Britain and Greece of 1926, and separately signed by the parties, was a 'provision' of the Treaty to which it was annexed, within the meaning of Article 29 of the Treaty, and consequently founded the jurisdiction of the Court to determine a dispute relating to the interpretation of the Declaration. In reaching this conclusion, the Court drew on the wording of the instruments of ratification of the Treaty, the fact that the Plenipotentiaries had included the Treaty and the Declaration in a single document, as had the United Kingdom government in publishing them in the Treaty Series, and that both countries had registered them with the League of Nations under a single number.[94]

35.45 The style 'declaration' is also occasionally given to agreements between governments regarding some relatively minor matter. A modern example is the Declaration on the Construction of Main International Traffic Arteries of 16 September 1950.[95]

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90 UN Doc A/CN.4/L.703of 20 July 2006.

91 Ibid.

92 A notorious recent example of this type being the 'National Security Strategy' promulgated in September 2002 by the George W Bush Administration in the USA (text available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>).

93 1952 ICJ Reports 28: the case arose out of a claim by a Greek shipowner (Mr Ambatielos) who alleged that he had suffered considerable loss in consequence of a contract which he concluded in 1919 with the British government.

94 'No. 1425. Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying Declaration signed at London, July 16 1926.'

95 96 UNTS 91.

Exchange of Notes

35.46 The treaty concluded in the form of an exchange of Notes or letters is, in modern times, the most frequently used device for formally recording the agreement of two governments upon all kinds of transactions. It takes the form not of a single instrument but of an ordinary exchange of correspondence between the ambassador of one State and the minister for foreign affairs of the State to which he is accredited. The content of the agreement to be recorded by the exchange of Notes will of course have been agreed in advance between the two governments. The initiating Note sets out the provisions of the proposed agreement and goes on to suggest that if the proposals are acceptable to the other government the initiating Note and the other government's reply to that effect should constitute an agreement in the matter. The exchange is then concluded by way of a Note in reply accepting the proposal in the initiating Note.

35.47 It is not customary to exhibit Full Powers for an exchange of Notes. Nor are exchanges of Notes normally subject to ratification, although in some cases they may be. The International Law Commission in their commentary to what is now Article 14 of the Vienna Convention on the Law of Treaties, summarize the position as follows:

> Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to an ever-increasing use of less formal types of international agreements, amongst which were exchanges of Notes, and these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease of convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or other of the contracting States.[96]

The fact that exchanges of Notes do not normally require ratification, and accordingly enter into force as soon as the exchange has been effected, makes them a very convenient and flexible instrument for treaty-makers. Although the form is used for recording agreement between two governments on a wide variety of routine matters, it has also been used to regulate transactions of considerable political importance. Thus, exchanges of Notes have dealt with such matters as the transfer and lease of military bases, the maintenance of armed forces and military missions on foreign soil, settlement of war claims, settlement of boundary disputes, delimitation of territorial waters, and jurisdiction over foreign armed forces for criminal offences.[97] More recently, the device of an exchange of Notes

[96] 1966 ILC Reports 30.

[97] These and other examples are given by Weinstein, 'Exchanges of Notes' (1952) 29 *BYIL* 205–26.

was used to record the interim agreement between the United Kingdom and Iceland in connection with the fisheries dispute occasioned by the Icelandic claim to a 50-mile exclusive fisheries limit.[98]

35.48 Normally the Notes exchanged recording the agreement bear the same date, in which case, unless they provide otherwise, the agreement has effect from that date. If they bear different dates, that of the last Note, or at any rate the date of its receipt, is the governing date (unless otherwise provided), since it is the acceptance of the initiating proposal that constitutes the agreement on both sides. It is also now commonplace for the coming into force of an exchange of Notes to be postponed until the necessary internal requirements (short of ratification) have been completed on both sides. In that case the exchange of Notes will provide for each side to notify the other formally when its internal requirements have been met.

35.49 Agreements embodied in exchanges of Notes are, as a general rule, bilateral. Exceptionally, there may be more than two States concerned in an exchange of Notes or letters. The agreement between the Bank for International Settlements, on the one hand, and the United Kingdom, United States, and French governments, on the other hand, for the return to those governments of gold looted by Germany was constituted by a letter addressed to representatives of the three governments by the chairman of the Bank and by a letter in reply signed by the representatives of the three governments.[99] A somewhat unorthodox example of a 'multilateral' exchange is afforded by the exchange of letters on monetary questions annexed to the Treaty concerning the Accession of Denmark, Ireland, Norway, and the United Kingdom to the EEC and EURATOM of 22 January 1972. The initiating letter was addressed by Mr Geoffrey Rippon (the minister in charge of the United Kingdom delegation for the entry negotiations) to M. Thorn (Minister for Foreign Affairs of Luxembourg) in his capacity as president of the EEC Council of Ministers, and sought confirmation from 'the Governments of the Member States of the Community and of the Governments of the Kingdom of Denmark, Ireland and the Kingdom of Norway' that they agreed to a declaration made by Mr Rippon in the course of the negotiations. The letter in reply was signed by M. Thorn and countersigned by the eight other foreign ministers.[100]

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98 Treaty Series No 122 (1973), Cmnd 5484.

99 Treaty Series No 38 (1948), Cmd 7456. So also, an exchange of Notes between the United Kingdom and Italian governments for the allocation to Italy of a share in the proceeds of sale by the International Refugee Organization of certain valuables, currencies, and securities, presumed looted by the German forces and taken from them in Italy by the forces of the Allies, was linked to a parallel exchange of Notes between the United States and Italian governments; see Treaty Series, No 52 (1951), Cmd 8294.

100 Treaty Series No 1 (1973) – Part I, Cmnd 5179–1, 272–4.

Formalities in the Drawing up of Treaties

35.50 The 'single-instrument' type of treaty (whether designated as treaty, convention, agreement, protocol, or declaration) is normally concluded, and the authenticity of its text established, by means of the signatures of the negotiators, who will, as a general rule, have to produce Full Powers for the purpose.[101] It will depend on the circumstances, but primarily on the intention of the parties as signified in the treaty, whether signature alone is sufficient to bring the treaty into force or whether some further step, such as ratification, is necessary.[102]

35.51 Sometimes, however, and particularly when there may be a significant interval between the conclusion of the negotiations and the signature of a treaty (for example, in order to enable the governments concerned to satisfy themselves as to the acceptability or otherwise of the agreement as a whole), the negotiators append to it their initials *ne varietur* as a guarantee of the authenticity of the text. Even when it may be intended to sign a treaty immediately upon the conclusion of the negotiations, the separate pages of the text are sometimes initialled prior to its reproduction in a form suitable for signature (this practice applies to bilateral rather than multilateral treaties). The act of initialling a treaty can of itself constitute a signature of the treaty when it is established that the negotiating States have so agreed.[103] The International Law Commission point out that in practice initialling, especially by a head of state, prime minister, or foreign minister, is not infrequently intended as the equivalent of full signature.[104] But initialling by lesser dignitaries may equally have the effect of full signature if this is the clear intention of the parties. Thus, the Memorandum of Understanding of 5 October 1954, between the Governments of the United Kingdom, the United States of America, Italy and Yugoslavia about the Free Territory of Trieste[105] provides that certain things were to be done 'as soon as this Memorandum of understanding has been initialled' or within a specified period from the date of initialling.

35.52 The preparation for signature of a bilateral 'single-instrument' treaty is undertaken by the country in whose capital the treaty is to be signed. The style and

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101 Vienna Convention on the Law of Treaties (Article 7). It should be noted that heads of state, heads of government, and ministers for foreign affairs are, in virtue of their functions and without having to produce full powers, considered as representing their state for the purposes of performing all acts relating to the conclusion of a treaty (see Chapter **34**, paragraph **34**.9). Credentials notifying the composition of a delegation to an international conference at which a treaty may be negotiated and signed do not constitute full powers for the purposes of signature.

102 See Chapter **38**, paragraphs **38**.12–**38**.17.

103 Vienna Convention on the Law of Treaties (Article 12.2).

104 1966 ILC Reports 29.

105 235 UNTS 99.

presentation of the instrument will accord with the practices of that country. Bilateral treaties are prepared for signature in duplicate, in order that each party may retain a signed original version of the treaty instrument. Each of the two countries is entitled to precedence in the original retained by it—that is to say, its language will (where the treaty text is printed on facing pages or in parallel columns) appear in the first or left-hand page or column; its title (or the title of its sovereign and representative) will be named first in the preamble; and the signature of its representative will appear above, or to the left of, the signature of the representative of the other party.

35.53 If a treaty covers more than a single sheet of paper, the sheets will be united by ribbon or fancy cord and the ends of the ribbon will be sealed. A cover will normally be supplied by the host government.

35.54 Personal seals (ie a hand-seal or signet-ring showing crest, emblem, or other device, or the initial letters of the owner's names) are used only when the treaty is drawn up in heads of state form and when the *testimonium* requires that the Plenipotentiaries should affix their seals to the treaty. Where a negotiator has no personal seal—as is nowadays usually the case—an official wax seal or wafer seal (which, in United Kingdom practice, bears the Royal Arms and the name of the diplomatic mission or the Foreign and Commonwealth Office as the case may be) is used.

35.55 A bilateral treaty between two countries which share the same language will be drawn up in that language.

35.56 Sometimes, however, a treaty may be drawn up in a language or languages which are not those of the Contracting Parties. The Treaty of Peace between Japan and Russia of 23 August/5 September 1905[106] was drawn up in English and French. Again a treaty may be drawn up not only in the languages of the Contracting Parties, but also in a third language, which prevails in the event of any divergence of interpretation.[107] Although this practice had fallen out of favour, it has now re-emerged in bilateral treaties for the promotion and protection of investments, which in several recent instances make an English-language version prevail even though it is not the language of either treaty party—presumably on the basis that English is regarded as the language of modern commerce and finance.

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106 *BFSP,* Vol 98, 75.

107 Examples are the Treaty of Peace between Indonesia and Japan of 20 January 1958 (UNTS, Vol 324, 241) which is drawn up in the Japanese, Indonesian, and English languages, the English text to prevail in case of any divergence of interpretation; and the Treaty of Friendship between Japan and Ethiopia of 19 December 1957 (UNTS Vol 325, 99) drawn up in the Japanese, Amharic, and French languages, the French text to be authentic in case of any divergence of interpretation.

Treaties in more than one Language

35.57 Where a treaty is drawn up in two or more languages, great care has to be taken to ensure the closest correspondence possible between the texts. But this may sometimes be difficult, more especially when the languages differ widely in character. The faith of negotiators that they have achieved concordance between differing language texts of a treaty may sometimes be sadly misplaced. In the important instance of the Four-Power Agreement on Berlin of 1971–72, significant nuances of difference between the English and French texts, on the one hand, and the Russian text, on the other, emerged at a very late stage immediately before signature and were never resolved. An attempt to mediate the practical consequences of this through the production of an agreed German version between the East and West German authorities who would have to implement its terms was equally unsuccessful, but the potential for future difficulty disappeared with the unification of Germany in 1990. And the 2007 Arbitration between the British and French ministers of transport and their respective concessionaires over the Concession Agreement for the Channel Tunnel revealed, in the words of the Tribunal, 'many discrepancies between its two equal and authoritative texts', which the Tribunal resolved by reference to the parent Treaty between the United Kingdom and France.[108]

35.58 Desirable as it may be in theory to pre-empt problems of this kind by specifying in the treaty that one language text is to be regarded as authoritative,[109] national sensitivities and the circumstances of negotiation will nowadays normally make this wholly unrealistic.[110]

35.59 The number of language texts in a multilateral treaty may vary from a single text to as many as six (Arabic, Chinese, English, French, Russian, and Spanish) for treaties concluded under the auspices of the United Nations, or 23 for the treaties providing for the accession of Romania and Bulgaria to the European Union in 2005, all being equally authentic.[111] But a multilateral treaty may be drawn up in

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108 <http://www.pca-cpa.org/upload/files/ET_PAen.pdf>.

109 To be distinguished from an 'authentic' text, ie one established as an accurate version of the treaty.

110 Provisions to this effect nevertheless continue in older treaties, such as for example the Warsaw Convention of 1929, which governs liability in respect of the carriage of passenger luggage by air; thus the French text was applied by the House of Lords in *Fothergill v Monarch Airlines* [1981] AC 251, as the implementing Act of Parliament required. And the 1982 version of the International Telecommunication Convention retains the provision for the French text to prevail in case of dispute.

111 See <http://eur-lex.europa.eu/en/treaties/index.htm#accession>. See also n 109 above for the distinction between 'authentic' and 'authoritative' texts.

two or three widely spoken language texts only (for example, in English, French, and Spanish), provision being made for 'agreed translations (or official texts) of the treaty to be established in other languages also)'.[112]

35.60 It is sometimes argued that the language (or languages) in which a multilateral treaty was negotiated should be given more weight in its interpretation than the other language texts. In the case of the United Nations Charter, for example, the working languages of the San Francisco Conference of 1945 were English and French, and the text of the Charter finally approved by the Coordination Committee—and from which the translations into other languages were made—was in English. There is however no evidence of international tribunals approaching questions of interpretation in this way, even though in practice it is likely that more judges and arbitrators work in English or French (or Spanish) than in other languages, and it is also true that the official and working languages of the International Court of Justice are English and French only.

35.61 The rule laid down in Article 33 of the Vienna Convention on the Law of Treaties is that 'the terms of the treaty are presumed to have the same meaning in each authentic text'. It then goes on to deal with the case where a comparison of the authentic texts discloses a difference of meaning which the application of accepted rules of treaty interpretation does not remove, and lays down that, leaving aside the case where the treaty has provided or the parties have agreed that, in case of divergence, a particular text shall prevail, the meaning is to be adopted 'which best reconciles the texts, having regard to the object and purpose of the treaty'.[113]

35.62 In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice said that:

> '. . . where two versions possessing equal authority exist, one of which appears to have a wider bearing than another, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.[114]

Even if that approach was justified by the particular question at issue in the case, the International Law Commission did not endorse it as a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts.[115] Nor is there any sign of the *Mavrommatis*

[112] An example is the Universal Copyright Convention of 6 September 1952; 943 UNTS 194.

[113] For a full and up-to-date account of the history of this provision and its application in practice, see R Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) 353 *et seq*.

[114] PCIJ, Series A, No 2, 19.

[115] 1966 ILC Reports 56.

presumption being followed by the International Court of Justice or by arbitral tribunals. In the *LaGrand* case[116] the International Court, finding itself 'faced with two texts [of its own Statute] which are not in total harmony', resolved the issue, in application of the rule in Article 33 of the Vienna Convention, by reference to the object and purpose of the Statute, together with the context of the provision in question.[117] Some years previously, the tribunal in the *Young Loan Arbitration*[118] had expressly rejected a submission that it should give special weight to the English text, as the language of negotiation, and had similarly applied the Vienna Convention rules by referring to other articles in the treaty, to its object and purpose, and to the negotiating history. In the Taba Arbitration of 1988, on the other hand, the Tribunal applied an English language translation (out of an Arabic translation) of a treaty in the Turkish language, on the basis that it was this translation the parties had relied upon in practice.[119]

116 2001 ICJ Reports 466.

117 See also the Decision of a Chamber of the Court in the *Elettronica Sicula (ELSI)* case, 1989 ICJ Reports 15.

118 59 ILR 494.

119 80 ILR 226.

36

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS—II PACT, CONSTITUTION, CHARTER, STATUTE, REGULATIONS, CONCORDAT, ADDITIONAL ARTICLES

Pact	36.1	**Regulations**	36.10
Constitution	36.3	**Concordat**	36.11
Charter	36.4	**Additional Articles**	36.16
Statute	36.8		

Pact

36.1 The term 'Pact' is used to denote an especially solemn international agreement, though it is sometimes loosely (and journalistically) used as shorthand for a treaty which bears another title. The Treaty for Renunciation of War signed at Paris on 27 August 1928,[1] is accordingly commonly referred to as the 'Kellogg–Briand Pact' or the 'Pact of Paris' (and is indeed cited as the latter in various resolutions of the League of Nations).

36.2 More recently, the formal designation 'Pact' has been given to several treaties which the negotiating parties regarded as being of a particularly solemn nature, such as the Pact of the League of Arab States signed in Cairo on 22 March 1945;[2] and the Pact of Bogotá, the name deliberately given to the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948.[3] However pithy and

[1] Text available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>.

[2] 70 UNTS 248.

[3] 30 UNTS 55. Article LX of the Treaty provides that the 'the present Treaty shall be called the Pact of Bogotá'.

convenient, the term is now largely out of fashion; so the Arab League, for example, refers to its Pact as 'Charter' in its official usage.

Constitution

36.3 This form of designation is self-explanatory when employed for a treaty whose purpose is to set up an organization. The constitutive instruments of a number of Specialized Agencies established after the Second World War within the framework of the United Nations system were designated 'constitutions': thus one has the Constitution of the Food and Agriculture Organization (FAO),[4] the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO),[5] and the Constitution of the World Health Organization (WHO).[6]

Charter

36.4 The term 'Charter' given to the constituent treaty of the United Nations appears to have originated in the United States Department of State with a research staff group to which was assigned the task of drafting a text to embody the principles of post-war international organization developed by studies made up to August 1943. It would seem that the term was conceived of, by analogy with Magna Carta, as symbolizing a grant of authority to the organization from the peoples represented by the governments which would institute it; and emphasis was given to this underlying idea by formulating the preamble in the name of 'We the peoples of the United Nations'.[7]

36.5 The designation 'Charter' for a treaty instrument is, however, no longer dependent upon such a philosophical concept. The constituent instrument of the Organization of American States is a Charter;[8] and the European Social Charter opened for signature at Turin on 18 October 1961[9] is drawn up in ordinary treaty

[4] See <http://www.fao.org/docrep/x5584E/x5584e0i.htm>.

[5] See <http://unesdoc.unesco.org/images/0012/001255/125590e.pdf#constitution>.

[6] See <http://www.who.int/governance/eb/who_constitution_en.pdf>.

[7] It may be noted here that the constitutive instrument of the League of Nations was designated 'Covenant' to emphasize its solemnity. It is said that President Woodrow Wilson, in choosing this title, derived inspiration from the Solemn League and Covenant of 1642 subscribed to by the Scottish people. The designation 'Covenant' is still occasionally used: for example, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights adopted by the General Assembly in 1966: 999 UNTS 171 and 993 UNTS 3.

[8] 119 UNTS 3.

[9] See <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>, and the revised version of 1996 at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

form, and no doubt carries the designation 'Charter' because it seeks to lay down the means for implementing what are considered to be the basic economic and social rights of the individual.

The term 'Charter' has also been given to certain instruments which do not purport to be treaties, whatever influence they may have as being declaratory of the aspirations of those who subscribe to them. Into this category falls the Charter of Economic Rights and Duties of States adopted by the United Nations General Assembly.[10] **36.6**

Another such instance is the Charter of Paris for a New Europe, adopted at a meeting of the heads of state or government of the participating States of the Conference on Security and Co-operation in Europe (CSCE) held in Paris in November 1990. This instrument represents something of a hybrid: although formally subscribed to by the high representatives in a manner similar to a treaty, it declares merely their 'determination to act in accordance with the provisions we have adopted', and expressly recites that the instrument is not registrable under Article 102 of the United Nations Charter.[11] Yet it remains the case that some of the agreements recorded in the Charter had operative effect within the framework of the CSCE and the functioning of its institutions, and laid down the corresponding financial liabilities of the participating States.[12] **36.7**

Statute

'Statute' as the designation for a treaty instrument has come into treaty usage from parliamentary practice. It is used to refer to a basic act which regulates an institution or specific international regime; in so far as it may be the constituent instrument of an international organization, it is or may be interchangeable with 'Constitution'. Examples of use of the term to denote the constituent instrument of an international organization are the Statute of the Council of Europe,[13] the Statute of the Hague Conference on Private International Law,[14] and the Statute of the International Atomic Energy Agency.[15] The Statute of the International Court of Justice which forms an integral part of the United Nations Charter is another example of the use of the term 'Statute' to denote a **36.8**

10 GA resolution 3281 (XXIX).
11 cf the similar provision in the Helsinki Final Act; Chapter 35, paragraph 35.8 above.
12 The full text of the Charter is available at <http://www.osce.org/item/4047.html>.
13 <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.
14 <http://www.hcch.net/index_en.php?act=conventions.pdf&cid=29>.
15 <http://www.iaea.org/About/statute_text.html>.

constituent instrument. The more recent Statute of the International Criminal Court[16] is an example of a complex treaty instrument that both brings into being a significant international organism (the Court) and lays down important rules of substantive law.

36.9 In earlier times, and particularly during the period of the League of Nations, the term 'Statute' was used more generally for treaty instruments setting up regimes for particular territories or for particular waterways. The first use of the term in this sense appears to have been in the Convention and Definitive Statute of the Danube concluded on 23 July 1921.[17] Other instruments of this type adopted within the framework of the League of Nations were the Statute on the Regime of Navigable Waterways of International Concern[18] and the Statute on the International Regime of Railways.[19] Finally, the special regime governing Memel during the inter-war period was embodied in the Statute of Memel annexed to the Convention of Paris of 8 May 1924.[20]

Regulations

36.10 The term 'Regulations' is used in cases where the constitution of a technical Specialized Agency makes provision for the adoption of detailed rules designed to regulate particular activities, and such Regulations may occasionally themselves constitute a treaty instrument in their own right. For example, the World Health Assembly (the supreme organ of the World Health Organization) is competent to adopt health regulations which come into force for those Member States which do not reject them or make a reservation to them within a specified period; current regulations of this type are the International Health Regulations, 2005.[21] Article 42 of the International Telecommunication Convention 1982 lays down that its provisions 'are supplemented by the Administrative Regulations which regulate the use of telecommunication and shall be binding on all Members'.[22] Regulations of this nature undoubtedly give rise to treaty obligations and constitute a flexible device whereby the Organization and its Member States can seek to keep abreast of technical advances.

16 Sometimes loosely referred to as 'the Rome Statute'; 2187 UNTS 90.
17 26 LNTS 173.
18 7 LNTS 35
19 47 LNTS 55.
20 29 LNTS 85.
21 See <http://www.who.int/csr/IHR2005/en/index.html>.
22 See, for example, the Radio Regulations 1995, subsequently amended from time to time, and now issued in consolidated form in 2008; see <http://www.itu.int/publ/R-REG-RR/en>.

Concordat

A concordat is an agreement between the Pope and the head of a State which has for its purpose to safeguard the interests of the Roman Catholic Church in the State concerned.[23] It would seem that after the Second Vatican Council, which ended in 1965, the term 'concordat' was dropped entirely for a time, but Concordats have in recent years been concluded with Poland in 1993 and Portugal in 2004.[24] **36.11**

There was formerly considerable controversy as to the status of concordats in international law, particularly during the period prior to the conclusion of the Lateran Treaty between the Holy See and Italy in 1929. Hall took a rather extreme view of the status of concordats: **36.12**

> Contracts entered into between states and private individuals, or by the organs of states in their individual capacity, are, of course, not subject to international law. Of this kind are Concordats, because the Pope signs them not as a secular prince but as head of the Catholic Church.[25]

Fauchille took the view that concordats resembled treaties as to form, but differed from them as to their object. He summarized the position in the following terms:

> Deux puissances, l'une temporelle, l'Etat, l'autre, spirituelle, le Pape, indépendantes l'une de l'autre, toutes deux personnes internationales, souveraines l'une et l'autre dans l'ordre d'intérêts qu'elles ont à régir et à sauvegarder, se heurtant sur les limites de leurs domaines respectifs, s'accordant ensemble: voilà en quoi un concordat ressemble à un traité international.
>
> Mais la différence est dans le fond. L'objet des concordats n'est pas matière de droit international. C'est matière de droit public interne. Il s'agit de combiner le libre exercice d'un culte avec le maintien de l'ordre public et des principes fondamentaux d'une constitution et d'un état social déterminés.[26]

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23 The term 'concordat' has latterly acquired considerable vogue to describe written understandings arrived at between public authorities as to how they will exercise their functions and powers in relation to one another, but these are of no interest from the viewpoint of international affairs, except those elements of the agreements setting out the framework for cooperation between United Kingdom government departments and the devolved administrations in Scotland, Wales, and Northern Ireland, to the extent that they deal with international relations and European affairs; see FCO Guidance,19–23.

24 There is also a recent concordat of 12 January 2009 concluded with Schleswig-Holstein in exercise of the limited degree of power in external relations permitted to the *Länder* under the Constitution of the Federal Republic of Germany.

25 W E Hall, *A Treatise on International Law*, Pearce Higgins (ed) (8th edn, Oxford: Clarendon Press, 1924) 379.

26 P Fauchille, *Traité de Droit International Public* (8th edn, 1926) Vol 1, Part 3, 442.

36.13 The content of concordats would seem to confirm the view expressed by Fauchille. Generally speaking, concordats deal with the following types of subject matter:

1. Nomination of bishops (the Pope having the sole right of episcopal appointment subject to consultation with the government of the State concerned before nomination);
2. Guarantee that the Papal nominees would be of the nationality of the State concerned;
3. Adjustment of the State's legislation to canon law as regards the legal position of dioceses, parishes, religious orders, etc;
4. Guarantees for Catholic schools, charitable works, and ecclesiastical property;
5. Arrangements concerning the validity of canon law inside the State concerned in the sphere of matrimonial law; and
6. Various rules concerning the personal status of the Catholic clergy (for instance, exemption from military or jury service).[27]

36.14 Myers takes the view that '[c]oncordats concluded between the Pope and States are not treaties, but the Pope as head of the Vatican State has the capacity to make treaties and a concordat concluded by him in that capacity would be a treaty'.[28] A similar view is taken by Ferrari:

> Today the Holy See is considered to be a subject of international law which is capable of concluding with States some bilateral acts whose status is comparable to that of international treaties. The concordat is therefore a bilateral treaty which exists between two independent and sovereign authorities placed in the condition of reciprocal equality . . . According to most jurists, the obligations deriving from concordats are relevant in the international legal system and concordats are treaties of international law.[29]

It appears nevertheless to be the case that no concordat has yet been registered with the United Nations under Article 102 of the Charter.[30]

36.15 Accordingly, even though concordats are analogous to treaties, and operate to create reciprocal rights and obligations as between the Contracting Parties, the matters they seek to regulate touch mostly on the public law of the State concerned rather than international relations.

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27 Ibid, 603.

28 Ibid, 603.

29 S Ferrari, 'Concordats,' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online edition, [<http://www.mpepil.com>], visited on 14 March 2009.

30 See Chapter **39**, paragraph **39**.52 *et seq*.

Additional Articles

36.16 The type of treaty instrument designated as Additional Articles is now obsolescent. Additional Articles were originally articles appended to an international agreement in relation to some subsidiary matter, or in qualification of a provision in the main instrument, and signed at the same time as the latter. Thus, simultaneously with the signature at Paris on 30 May 1814, of the Definitive Treaty of Peace and Amity between the British and French Crowns which paved the way for the Congress of Vienna, Additional Articles were signed between France and Great Britain relating to steps to be taken for the abolition of the slave trade, the liquidation of accounts of expenses incurred through the maintenance of prisoners of war, etc. Although subject to ratification, they were to 'have the same force and validity as if they were inserted word for word in the Treaty Patent of this day'.[31]

36.17 In modern treaty-making practice, a treaty instrument relating to a subsidiary matter and signed simultaneously with the main treaty, convention, or agreement would almost certainly be designated as a protocol, a protocol of signature, or an agreed minute; alternatively, the substance of the additional provisions agreed upon would be embodied in an exchange of Notes or an exchange of letters accompanying the signature of the treaty itself.

36.18 Additional Articles were sometimes concluded at a later date as agreements between governments, and occasionally styled Additional Act, in amplification or modification of the provisions of an existing treaty. Modern practice is, however, to call treaty instruments of this nature supplementary or additional conventions, agreements, or protocols.

[31] *BFSP,* Vol 1, 172.

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37

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS—III ACT, GENERAL ACT, FINAL ACT, *MODUS VIVENDI*, *COMPROMIS* (SPECIAL AGREEMENT)

Act	37.1	***Modus Vivendi***	37.11
General Act	37.3	***Compromis* (Special Agreement)**	37.14
Final Act	37.5		

Act

37.1 The term 'Act' (as distinguished from 'General Act' or 'Final Act') is an old form of treaty nomenclature, sometimes used to designate an international instrument which, in and of itself, may lack some of the formal characteristics of a treaty, but which nevertheless forms part of a complex of treaty instruments. In this sense, an 'Act' will constitute a piece of international law-making and may indeed embody the decisive terms of the treaty complex. A recent example of this kind of usage is the 'Act concerning the Conditions of Accession and the adjustments to the Treaties on which the European Union is founded', annexed to the Treaty concerning the Accession of the Republic of Bulgaria and Romania to the European Union.[1] The Act of Accession consists of 61 substantive articles, which, when read with 9 annexes, a Protocol to the Treaty with further annexes and appendices, and a single exchange of letters, all attached to the Treaty and forming an integral part of it,[2] constitute the substantive terms upon which the accession of the two new Member States to the European Union was negotiated.

[1] OJ L157/203; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:0203:0220:EN:PDF>.

[2] Article 59.

37.2 A different usage of the term 'Act' developed in the practice of the Latin American States. On at least two occasions, the Latin American States have used the device of an 'Act' to assert, in advance of events, what their collective policy will be. Thus, the Act of Habana of 30 July 1940[3] was intended to make clear the position of the American Republics if Germany attempted to take French or other European territorial possessions in the Americas before a Convention of the same date could be ratified. Similarly, the Act of Chapultepec of 8 March 1945[4] was drawn up by an Inter-American Conference on Problems of War and Peace in the form of an agreement concerning reciprocal assistance and solidarity; the Act of Chapultepec tended to unite the positions of the participating States in advance of the San Francisco Conference and it clearly had some influence on the formulation of Articles 51–54 of the United Nations Charter. Neither of these two instruments would, however, appear to rank as a treaty.

General Act

37.3 General Act became familiar in the late nineteenth century and early twentieth century as the name of a treaty of general import negotiated at an international conference. The Berlin Conference of 1885 drew up a series of detailed provisions concerning:

(a) freedom of trade in the Congo Basin, its tributaries, and neighbouring countries;
(b) the protection of the inhabitants, missionaries, and travellers, as well as religious freedom;
(c) the postal regime in the Congo Basin;
(d) the slave trade in the Congo Basin;
(e) neutrality of territories comprised in the Congo Basin;
(f) navigation on the Congo; and
(g) navigation on the Niger.

These detailed provisions were united in a single General Act, itself clearly constituting a treaty.[5]

[3] M O Hudson, *International Legislation*, Carnegie Endowment for International Peace (Washington, 1931) Vol 8, 563.

[4] (1945) 39 *AJIL* Supplement, 108: it may be noted that the Act of Chapultepec consists in substance of a Declaration and Recommendation, together to be known by the name of 'Act of Chapultepec'.

[5] *BFSP*, Vol 76, 4. A later conference in Berlin concerned itself with the affairs of the Samoan Islands and drew up a General Act on the Affairs of Samoa dated 14 June 1889, ibid, Vol 81, 1058.

Further instances of the use of the term are the General Act of the Brussels Conference of 1890 relative to the African Slave Trade;[6] the General Act of the Algeciras Conference of 1906 relative to the Affairs of Morocco;[7] the General Act for the Pacific Settlement of International Disputes of 26 September 1928, prepared under the auspices of the League of Nations;[8] and the Revised General Act for the Pacific Settlement of International Disputes of 28 April 1949, prepared under the auspices of the United Nations.[9] **37.4**

Final Act

The term 'Final Act' (*Acte Final*) is normally used to designate a document which constitutes a formal statement or summary of the proceedings of an international conference, recording the result of its deliberations, including, as the case may be, enumerating the treaties or related treaty instruments drawn up, together with any resolutions or *vœux* adopted by the conference. The signature of an instrument of this nature does not in itself entail any expression of consent to be bound by the treaties or related treaty instruments so enumerated. **37.5**

An example of this type of Final Act is provided by that of the Vienna Conference on the Law of Treaties. This contains the following: **37.6**

1. A description of the background to the convening of the Conference;
2. A list of the States represented at the first and second sessions of the Conference (103 States represented at the first session and 110 States at the second session);
3. A list of the Specialized Agencies and interested intergovernmental organizations which had accepted invitations to attend the Conferences as observers;
4. Statements as to the election of the president and vice-presidents of the Conference;
5. A list of the committees set up by the Conference, with their officers and membership;
6. Statements as to the documentation before the Conference and as to the drawing up of the Vienna Convention on the Law of Treaties;
7. The text of the Convention *in extenso*;

6 Ibid, Vol 82, 55.
7 Ibid, Vol 99, 141: this is sometimes popularly referred to as the 'Act of Algeciras'.
8 Ibid, Vol 130, 878.
9 UNTS, Vol 71, 101. The General Act or Revised General Act has been claimed by the Applicant state to serve as the jurisdictional basis for contentious proceedings before the International Court of Justice on several occasions, but the ICJ has on each occasion on which it upheld its jurisdiction done so on other grounds.

8. A statement relating to the adoption of the Convention by the Conference and to its opening for signature and eventual deposit with the secretary-general of the United Nations;
9. A list of the declarations and resolutions adopted by the Conference and annexed to the Final Act:
   (a) Declaration on the prohibition of military, political, or economic coercion in the conclusion of treaties;
   (b) Declaration on universal participation in the Vienna Convention on the Law of Treaties;
   (c) Resolution relating to Article 1 of the Vienna Convention on the Law of Treaties;
   (d) Resolution relating to the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties;
   (e) Resolution relating to Article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto;
   (f) Tribute to the International Law Commission; and
   (g) Tribute to the government and people of the Republic of Austria.

It is self-evident that an instrument of this nature does not per se constitute a treaty, since it is simply a summary of the proceedings of the Conference which drew up the Vienna Convention on the Law of Treaties.

37.7 This is the normal type of Final Act, of which many examples can be found in treaty practice. One of the first instances of the use of this device is the Final Act of the Hague Conference of 1899. After much discussion as to how the results of the Conference should be formally recorded, it was eventually decided to draw up a Final Act which would be a résumé of the work done by the Conference and as such would be signed by all the Powers present 'who thus affirmed the authenticity of the record without binding themselves to sign each of the Conventions or adhere to each of the Declarations or Wishes contained in the Act'.[10] Sir Julian Pauncefote (one of the principal United Kingdom delegates) described the Final Act of the Conference as 'an exposition of the work of the Conference presented to the various Governments for their information and approval'.[11]

37.8 The Final Act of the Second Peace Conference held at The Hague in 1907 was drawn up in precisely the same form. It records:

1. the background to the convening of the Conference;
2. the names of the delegates representing each Power taking part;

[10] Pearce Higgins, *The Hague Peace Conferences* (1909) 41.
[11] Sir J Pauncefote to the Marquess of Salisbury, 31 July 1899: *Parl. papers, Misc.,* No 1 (1899), 278.

3. enumeration of the 13 Conventions and the single Declaration drawn up for signature;
4. the text of a separate declaration on compulsory arbitration;
5. the text of a resolution on limitation of military expenditure; and
6. the texts of four recommendations *(vœux)*.

It is then signed by the Plenipotentiaries and provision is made for its deposit with the depositary government.

37.9 Most modern international conferences convened to draw up international conventions, including those convened under the auspices of the United Nations, conclude by adopting a Final Act of this nature. A recent example is the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court done at Rome on 17 July 1998.[12]

37.10 It is possible for a Final Act to constitute a treaty in its own right, but this would be highly exceptional. The Final Act of the Wheat Conference done at London on 25 August 1933 appears to be an example of an international agreement drawn up in the form of a Final Act.[13] It must be stressed, however, that most Final Acts are of the procès-verbal type already described and are not treaties, ie do not create rights and obligations for the signatories.[14]

Modus Vivendi

37.11 This is the title given to a temporary or provisional agreement, usually intended to be replaced later on, if circumstances permit, by one of a more permanent and detailed character. It may not, however, always be designated as such: more often than not, what is in substance a *modus vivendi* may be designated as a 'temporary agreement' or an 'interim agreement'.

37.12 An example of a treaty which is in fact formally designated as a *modus vivendi* is the Modus Vivendi between the Belgo-Luxembourg Economic Union and Turkey relating to the application of Most Favoured Nation Treatment, of 12 March 1947.[15] This provides for most-favoured-nation treatment over navigation and customs duties, formalities, and charges, pending the entry into force of a treaty of commerce and navigation between the parties. Another is the

[12] UN Doc. A/Conf.183/10; <http://untreaty.un.org/cod/icc/statute/finalfra.htm>.
[13] Treaty Series No 38 (1933), Cmd 4449.
[14] See H W Briggs, 'The Final Act of the London Conference on Germany' (1955) 49 *AJIL* 148–65, especially at 149–52.
[15] 37 UNTS 223.

Temporary Commercial Agreement between the United Kingdom Government and the Government of the Union of Soviet Socialist Republics signed at London on 16 April 1930.[16] This records (in the preamble) the desire of the two governments to conclude as soon as possible a Treaty of Commerce and Navigation, and then states that the two governments 'have meanwhile agreed upon the following temporary Agreement to serve as a modus vivendi pending the conclusion of such a Treaty'. The Agreement is expressed to come into force on signature and to remain in force pending the coming into force of a commercial treaty, subject to the right of either party to give six months' notice of termination.

37.13 A more recent example of what is in substance a *modus vivendi* (although not so designated) is the Exchange of Notes of 13 November 1973, constituting an Interim Agreement in the Fisheries Dispute between the United Kingdom Government and the Icelandic Government,[17] and concluded after the United Kingdom had already instituted proceedings against Iceland before the International Court of Justice in relation to the substantive dispute. The Exchange of Notes records that:

> . . . the following arrangements have been worked out for an interim agreement relating to fisheries in the disputed area, pending a settlement of the dispute and without prejudice to the legal position or rights of either Government in relation thereto . . .

In its judgment on the merits of the Fisheries Jurisdiction case, the Court says:

> The interim agreement of 1973, unlike the 1961 Exchange of Notes, does not describe itself as a 'settlement' of the dispute and, apart from being of limited duration, clearly possesses the character of a provisional arrangement adopted without prejudice to the rights of the Parties, nor does it provide for the waiver of claims by either Party in respect of the matters in dispute.[18]

The Court accordingly concluded that there still existed at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties, and that the existence of the interim agreement ought not to lead it to refrain from pronouncing judgment.

Compromis (Special Agreement)

37.14 This term denotes an agreement to refer a dispute to arbitration or to judicial settlement, the matters in dispute being defined more clearly in the agreement itself. The normal English equivalent of the term is 'special agreement' (though 'Arbitration Agreement' is frequently used in the case of an arbitration);

16 Treaty Series No 19 (1930) Cmd 3552.
17 Treaty Series No 122 (1973), Cmnd 5484.
18 1974 ICJ Reports 18.

and in French or Spanish the single word *'compromis'* or *'compromiso'* is used. Article 40.1 of the Statute of the International Court of Justice provides that:

> Cases are brought before the Court, as the case may be, either by the notification of the special agreement (*compromis*) or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

37.15 Several cases have been referred to the International Court of Justice in this way. A good recent example is the Special Agreement for Submission to the International Court of Justice of the Dispute between Malaysia and Singapore Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, which was jointly notified to the Court on 24 July 2003.[19] The main provisions of this Special Agreement read as follows:

> The Government of Malaysia and the Government of the Republic of Singapore (hereinafter referred to as 'the Parties');
>
> Considering that a dispute has arisen between them regarding sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge;
>
> Desiring that this dispute should be settled by the International Court of Justice (hereinafter referred to as 'the Court');
>
> Have agreed as follows:
>
> *Article 1*
>
> *Submission of Dispute*
>
> The Parties agree to submit the dispute to the Court under the terms of Article 36 (1) of its Statute.
>
> *Article 2*
>
> *Subject of the Litigation*
>
> The Court is requested to determine whether sovereignty over:
>
> *(a)* Pedra Branca/Pulau Batu Puteh;
> *(b)* Middle Rocks;
> *(c)* South Ledge,
>
> belongs to Malaysia or the Republic of Singapore.
>
> *Article 3*
>
> *Order of Names*
>
> For the purposes of this Special Agreement the order of the use of the names Pedra Branca/Pulau Batu Puteh or vice versa shall not be treated as having any relevance to the question of sovereignty to be determined by the Court.

[19] See <http://www.icj-cij.org/docket/files/130/1785.pdf>.

.....

.....

Article 5

Applicable Law

The principles and rules of international law applicable to the dispute shall be those recognized in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice.

Article 6

Judgment of the Court

The Parties agree to accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.[20]

37.16 The content of a special agreement (*compromis*) referring a dispute to the International Court of Justice can be relatively simple since the composition of the Court and the procedure to be followed are already determined by the Statute of the Court and the Rules of Court. More complex arrangements are necessary when the parties wish to refer a dispute to an ad hoc court of arbitration. Article 52 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on 18 October 1907, lays down the essential points to be covered in a *compromis* and describes the other matters it should regulate.

37.17 Basing itself on this and other material, the International Law Commission drew up in 1958 a set of Model Rules on Arbitral Procedure, which the General Assembly brought to the attention of Member States 'for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or *compromis*'.[21] Article 2 of the Model Rules reads as follows:

1. Unless there are earlier agreements which suffice for the purpose, for example in the undertaking to arbitrate itself, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, as a minimum:
   (*a*) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;
   (*b*) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;
   (*c*) The method of constituting the tribunal and the number of arbitrators.

[20] For the Judgment of the Court in the case, given on 23 May 2008, see <http://www.icj-cij.org/docket/files/130/14492.pdf>.

[21] General Assembly resolution 1262 (XIII) of 14 November 1958.

2. In addition, the *compromis* shall include any other provisions deemed desirable by the parties, in particular:
   (i) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;
   (ii) The power, if any, of the tribunal to make recommendations to the parties;
   (iii) Such power as may be conferred on the tribunal to make its own rules of procedure;
   (iv) The procedure to be followed by the tribunal; provided that, once constituted, the tribunal shall be free to override any provisions of the *compromis* which may prevent it from rendering its award;
   (v) The number of members required for the constitution of a *quorum* for the conduct of the hearings;
   (vi) The majority required for the award;
   (vii) The time limit within which the award shall be rendered;
   (viii) The right of the members of the tribunal to attach dissenting or individual opinions to the award or any prohibition of such opinions;
   (ix) The languages to be employed in the course of the proceedings;
   (x) The manner in which the costs and disbursements shall be appointed;
   (xi) The services which the International Court of Justice may be asked to render.

This enumeration is not intended to be exhaustive.

37.18 The Permanent Court of Arbitration (PCA) is a body established under the Hague Conventions of 1899 and 1907 with the aim of facilitating the settlement of international disputes by recourse to arbitration. Its headquarters are in the Peace Palace at The Hague, alongside the International Court of Justice. As now organized, the PCA offers hearing facilities and ancillary administrative services to arbitral tribunals operating ad hoc or under the auspices of another institution, and as part of these services has drawn up a list of model clauses for the submission of disputes to arbitration. It has also in recent years revised, or drawn up afresh, a series of Rules of Procedure suitable for the conduct of arbitrations between States, arbitrations involving international organizations, and other combinations of disputing parties, most notably the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, adopted in 1992.[22]

[22] Text at <http://www.pca-cpa.org/upload/files/2STATENG.pdf>.

37.19 A recent example of a *compromis* for reference of a dispute to ad hoc arbitration, making use of the facilities of the PCA, is provided by the Arbitration Agreement of July 2003 between the Belgian and Netherlands governments.[23] This concerns the reactivation of the so-called 'Iron Rhine' railway line, and how the associated costs are to be borne. The two governments agreed that the Tribunal should operate under the PCA's Optional Rules as modified by agreement between them.

[23] Full text, with English translation, available at <http://www.pca-cpa.org/upload/files/BE-NL%20Arbitration%20Agreement.pdf>. For other such agreements see: <http://www.pca-cpa.org/showpage.asp?pag_id=1029>.

38

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS—IV RATIFICATION, ACCESSION, ACCEPTANCE AND APPROVAL

Ratification	38.3
Accession	38.19
Acceptance and Approval	38.31

38.1 A treaty becomes binding through the expression of consent of the parties to be bound. This consent may be expressed by various means, notably signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession, or by any other means if so agreed.[1] The treaty itself may provide that it is to enter into force upon signature, in which case the act of signature definitively expresses the consent of the signatory States to be bound by the treaty. In exceptional cases, the initialling of a text may also express the consent of the States concerned to be bound by it, when it is established that the negotiating States have so agreed.[2] It sometimes happens that a representative of a State is unable to receive definite instructions from his government by the time of signature; or it may be that the treaty is to enter into force on signature but the government concerned wants the opportunity to study the agreed text in greater detail before taking the final decision. In such circumstances, the representative may sign the treaty *ad referendum*, which, if subsequently confirmed, will constitute a valid expression of consent to be bound, effective as from the date of the signature *ad referendum*.[3] Alternatively, the formal signature of the treaty may

[1] Article 11 of the Vienna Convention on the Law of Treaties.
[2] See Chapter **35**, paragraph **35**.51.
[3] Article 12.2(b) of the Vienna Convention on the Law of Treaties.

simply be postponed until the States concerned are all in a position to commit themselves.

38.2 The very great majority of multilateral treaties, and a significant proportion of bilateral treaties are, however, nowadays concluded subject to ratification or some other process of subsequent confirmation, and it is these processes which must now be considered.

Ratification

38.3 Ratification is a solemn act on the part of a sovereign or other head of state declaring that a treaty, convention, or other international instrument has been submitted to him and that after examining it he has given it his approval, and undertaken its complete and faithful observance. The instrument of ratification is signed by the head of state, and sealed with the seal of state, though practice varies as to whether the complete text of the treaty and related instruments should be reproduced in it. Where the treaty is not in head of state form, but in interstate or intergovernmental form, the form of the instrument of ratification is adjusted accordingly.[4]

38.4 In the case of a bilateral treaty, instruments of ratification are exchanged, in other words each party delivers to the other its instrument of ratification and receives a similar one in return. The fact of exchange is recorded in a certificate of exchange, which is ordinarily drawn up in the respective languages of the two parties, and signed in duplicate, each party retaining an original in which it is given the customary precedence. As a rule the exchange is effected by the head of the department concerned with treaty formalities in the ministry of foreign affairs of the one country and a diplomatic representative of the other. The issue of Full Powers for such a purpose is unnecessary, unless, as occasionally happens, one of the parties should insist on this additional formality; normally, however, the production of the instruments of ratification by the officials undertaking the exchange is regarded as sufficient evidence that they are authorized to proceed to the exchange.

38.5 For bilateral treaties, the FCO Guidance[5] now states that 'for almost all bilateral treaties, the ceremonial exchange of ratification instruments has now been replaced by the mutual notification of the 'completion of internal procedures'.

[4] Standard forms for instruments of ratification are reproduced in the UN Treaty Handbook (see Chapter **35** n 1) and in Aust, *Modern Treaty Law and Practice*.

[5] See Chapter **35** n 1.

38.6 When there are more than two Contracting Parties to a treaty, it is customary to have only one original text of the treaty (in all language versions), which is signed by the negotiators and deposited in the archives of the State where it was signed, or of the international organization under whose auspices it was concluded, each of the other parties being furnished with a certified copy.[6] The instruments of ratification are then as a rule deposited with whichever government or international organ has been designated as the 'depositary'.[7] Amongst the duties of the depositary will be to deliver a formal acknowledgement of each deposit to the State concerned, and to notify the other States Parties or States entitled to become parties. The procedure to be followed in these cases is ordinarily laid down in the treaty itself.

38.7 In the United Kingdom, the treaty-making power is vested in the sovereign and the ratification of a treaty concluded in heads of state form is effected by means of an instrument of ratification signed by the Sovereign and sealed with the Great Seal.[8] Constitutionally the Sovereign acts on the advice of his or her responsible ministers and, in certain circumstances, notably where the execution of a treaty involves financial commitments or a cession of territory, the approval of Parliament will first be sought. Furthermore, if legislation is required to carry out the provisions of the treaty, Parliament will be asked to enact the necessary implementing legislation before the United Kingdom instrument of ratification is exchanged or deposited. Whether or not specific implementing legislation is required, the standing practice is to lay before Parliament the texts of all treaty instruments requiring ratification, accompanied in recent years by an explanatory memorandum, and not to proceed to ratification until, in the case of a particular treaty instrument for which no further parliamentary action is required, a period of 21 sitting days has elapsed.[9]

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[6] Though there are occasional exceptions to this rule. For some multilateral agreements the 'triple depositary' technique was adopted as a special exception to the general rule, devised during the period of divided States, so as to allow each of the component parts of those States to sign the treaty or deposit an instrument of ratification or accession with a depositary power that recognized it as a State, and thus as entitled to ratify or accede. Examples are: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including The Moon and Other Celestial Bodies 1967, the Treaty on the Non-Proliferation of Nuclear Weapons 1968, and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1972.

[7] For the functions of a treaty depositary, see Article 77 of the Vienna Convention on the Law of Treaties.

[8] Practice, of course, varies widely as regards the form and wording of an instrument of ratification. The UN Treaty Handbook (see Chapter **35** n 1) contains model texts in the Annexes.

[9] This is popularly known as the 'Ponsonby rule'; see the FCO Guidance (see Chapter **35** n 1), in particular the descriptive note on the current operation of the rule. A public consultation has recently been conducted on whether to enact the Ponsonby rule by Act of Parliament.

38.8 A number of points of interest arise in connection with ratification. First there is confusion over what the term 'ratification' precisely connotes. It is variously used to describe:

(a) The act of the appropriate organ of the State (sovereign, president, federal council, etc) which signifies the consent of the State to be bound by the treaty;
(b) The internationally agreed procedure whereby a treaty formally enters into force, that is to say, the formal exchange or deposit of instruments of ratification;
(c) The actual document or instrument whereby a State expresses its consent to be bound by the treaty; and
(d) More loosely, the approval of the legislature or other state organ whose approval may be constitutionally necessary as a condition precedent to ratification in the sense of (a) above.

As ratification is a technical term of international law, this last usage of the term, which is sometimes popularly translated into 'parliamentary ratification' is inaccurate. In the United Kingdom, it is the Crown which ratifies, not Parliament, though Parliament may, as a condition precedent to ratification, be invited to approve and, if necessary, to legislate. Thus, (a) is the correct technical sense of the term, and the Vienna Convention on the Law of Treaties defines ratification as 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.[10] Where (b) is intended, reference should be made to the exchange or deposit of instruments of ratification; and, strictly speaking, where (c) is intended, reference should be made to the instrument of ratification rather than to ratification tout court.

38.9 The second point relates to the purpose which ratification (and indeed other forms of subsequent confirmation) is designed to serve. McNair explains the position succinctly:

> Ratification is not (or, at any rate, since the days of absolute monarchs it has not been) a mere formality, like the use of a seal, or parchment, or tape. Ratification has a value which should not be minimized. The interval between the signature and the ratification of a treaty gives the appropriate departments of the Governments that have negotiated the treaty an opportunity of studying the advantages and disadvantages involved in the proposed treaty as a whole, and of doing so in a manner more

[10] Article 2(b) (emphasis supplied). In the analogous situation of the withdrawal of a reservation, the International Court has drawn a firm distinction between the adoption of internal legislation authorizing withdrawal and the formal notification of withdrawal on the international plane: *Case Concerning Armed Activities on the Territory of the Congo*, 2006 ICJ Reports 6, at 23–7 (for Reservations, see Chapter **39**).

> detached, more leisurely, and more comprehensive than is usually open to their representatives while negotiating the treaty. However careful may have been the preparation of their instructions, it rarely happens that the representatives of both parties can succeed in producing a draft which embodies the whole of their respective instructions; some concession on one side and some element of compromise are present in practically every negotiation. It is therefore useful that in the case of important treaties Governments should have the opportunity of reflection afforded by the requirement of ratification. Moreover, the more careful the preparation of the treaty and the more deliberate the decision to accept it, the more likely is the treaty to be founded upon the interests of the parties and to be observed by them.[11]

38.10 The third point is that ratification must, in principle, be unconditional. Its operative effect cannot, unless the treaty itself specifically so provides, be made dependent on the receipt or deposit of ratifications by other States. The need for a degree of reciprocity will be met, either by the treaty providing for a minimum number of ratifications before its entry into force,[12] or even by a provision that the ratification of all the signatories is required for entry into force.[13]

38.11 The fourth point is that ratification, being in part a confirmation of a signature already given, must relate to what the signature relates to, ie to the treaty as a whole, and not merely to a part of it, unless the treaty itself provides that States may elect to become bound by a certain part or parts only; this is of course without prejudice to the possibility of attaching reservations, which is considered more fully in Chapter 39.

38.12 Finally, there are the related questions of which treaties require ratification and which do not; and whether, assuming the treaty to be one which requires ratification, there is any duty to ratify.

38.13 The older view was that, in principle, all treaties required ratification in order to become valid and binding. The International Law Commission explained the reasons for this view:

> The modern institution of ratification in international law developed in the course of the nineteenth century. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself, but a confirmation that

[11] At 133–4.

[12] For multilateral Conventions concluded under the auspices of the UN, 35 is often the chosen number, but there may be further qualifications as well: the UN Charter required the ratification of all five states designated as permanent members of the Security Council, and the same rule applies to all amendments to the Charter.

[13] As, for example, with all of the constitutional treaties of the European Union.

> the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the sovereign to ratify his representative's full powers, if these had been in order. Ratification came, however, to be used in the majority of cases as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change.
>
> It was established that the treaty itself was subject to subsequent ratification by the State before it became binding. Furthermore, this development took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding.[14]

38.14 As late as 1929, the Permanent Court of International Justice gave expression to the view in the *Territorial Jurisdiction of the International Commission of the River Oder* case by referring to the rule that 'conventions, save in certain exceptional cases, are binding only by virtue of their ratification'.[15] But that traditional view no longer holds good. The generally accepted view is now the one expressed in Article 14 of the Vienna Convention on the Law of Treaties that whether a treaty requires ratification or not depends essentially on the intention of the parties to the particular treaty.

38.15 Fortunately, the dispute as to the nature of the underlying rule is more theoretical than real; for it is now almost the invariable rule for the treaty itself to contain either an express stipulation or other clear indication as to the intention of the parties on the question of whether ratification is required. Where the parties do not regard ratification as necessary, the treaty usually states that it will come into force upon signature, or on a certain date, or upon the happening of a certain event.

38.16 At the Vienna Conference on the Law of Treaties, there was extended, but inconclusive, discussion on whether there should be incorporated in the Law of Treaties Convention a residual presumption in favour of signature or of ratification when a treaty was silent as to how consent to be bound should be expressed. The Convention as adopted makes no attempt to resolve the argument, and simply enumerates the circumstances in which consent to be bound is expressed by signature, and the circumstances in which consent to be bound is expressed by ratification, acceptance, approval, or accession.[16]

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[14] 1966 ILC Reports 30; see also the judgment of Sir William Scott (later Lord Stowell) in *The Eliza Ann* (1813) 1 Dods 244 at 248, and J Mervyn Jones, *Full Powers and Ratification* (Cambridge: Cambridge University Press, 1946) 12–20 and 74–90.

[15] PCIJ Series A, No 23, 20.

[16] Articles 12, 14, and 15; see also Sinclair, 40–1.

38.17 It used to be thought that States were under a binding legal duty to ratify treaties entered into by their Plenipotentiaries, save in those exceptional cases where the Plenipotentiaries had exceeded their instructions, but as Judge Moore said in the *Mavrommatis Palestine Concessions* case:

> The doctrine that Governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past.[17]

On the other hand, although ratification is a matter of discretion, it is not generally the practice of an enlightened government to sign a treaty unless it means to make an effort in good faith to ratify it in due course. Successive British governments have held to that principle as a rule of policy. But, as is well known, governments may meet with insuperable political difficulties which prevent ratification.[18]

38.18 No time limit is normally set for ratification and, subject to the terms of the treaty, there is no rule of law as to the date within which, if at all, it must take place. Frequently several years elapse between signature and ratification.[19] Article 18 of the Vienna Convention on the Law of Treaties lays down a rule that, pending ratification, a signatory State is under an obligation 'to refrain from acts which would defeat the object and purpose of a treaty', which would continue until it had made clear its intention not to become party to the treaty; but it has been doubted whether this represents a rule of customary international law.

Accession

38.19 Accession is the process under which a State may become a party to a treaty of which it is not a signatory. The process is sometimes designated as 'adherence' or 'adhesion' (in French '*adhésion*'), but the Vienna Convention on the Law of Treaties uses the term 'accession'.

17 PCIJ Series A, No 2, 57.

18 For example, the then French government failed to obtain in 1954 the necessary parliamentary approval required to enable France to ratify the European Defence Community Treaty. More recently, the difficulties are well known that have faced the Treaty establishing a Constitution for Europe of 29 October 2004, and the subsequent Treaty of Lisbon of 13 December 2007, following their failure to be approved by referendum in certain EU Member States.

19 Though it is rare that the gap between signature and ratification is as long as 63 years, as for the United Kingdom ratification (in 1970) of the 1907 Hague Convention for the Pacific Settlement of International Disputes. A more modern example is the Additional Protocols to the Geneva Conventions of 1949, signed by the United Kingdom in 1977, but not ratified until 1998.

38.20 Accession is normally a secondary process, but it can exceptionally constitute the primary (or even the exclusive) process for a State to express its consent to be bound by a treaty. The 1928 General Act for the Pacific Settlement of International Disputes was drafted by a Commission set up by the Assembly of the League of Nations, subsequently discussed and modified, and eventually adopted by the Assembly itself, and then left open for accession. There was no provision for signature and ratification, so that accession was the only means of becoming a party to it.[20] The Revised General Act for the Pacific Settlement of International Disputes adopted by the United Nations General Assembly on 28 April 1949[21] not unnaturally follows the same pattern.

38.21 A similar process is followed by the Convention on the Privileges and Immunities of the United Nations.[22] The relevant provisions are:

> *Section 31*—This Convention is submitted to every Member of the United Nations for accession.
>
> *Section 32*—Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations and the Convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Similar, but slightly more complex, provisions are contained in the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations.[23]

38.22 It should be stressed, however, that these cases are exceptional. Multilateral treaties will normally make provision for the treaty to be open for signature until a stipulated date and thereafter to be open for accession, often indefinitely, an example being Articles 81 and 83 of the Vienna Convention on the Law of Treaties.[24]

38.23 It used to be thought that it was legally impossible to accede to a treaty which was not yet formally in force. The rationale of the view was that accession amounted in essence to acceptance of a contract already entered into, thereby implying an

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[20] Article 43 simply provides that 'the present General Act shall be open to accession by all the Heads of State or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose'; 93 LNTS 343.

[21] 71 UNTS 101.

[22] Approved by the UN General Assembly on 13 February 1946: 1 UNTS 15 and 90 UNTS 327.

[23] 21 November 1947, 33 UNTS 261.

[24] Under Article 81 the Convention was opened for signature until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters in New York; and under Article 83 it is to remain 'open for accession' thereafter.

operative instrument to accede to. Modern practice is however in the contrary sense. As the International Law Commission pointed out:

> an examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly, by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly, by making the entry into force of the treaty conditional on the deposit, *inter alia,* of instruments of accession.[25]

It is therefore open to the States negotiating a treaty to provide that it should be open to accession at once (or after the expiry of a stipulated period), even before the treaty has formally entered into force; and likewise to provide that accessions rank equally with ratifications in making up the number of consents to be bound required to bring the treaty into force.[26]

38.24 Accession as a secondary process comprehends accession as of right (where the treaty expressly provides that certain States or categories of States may accede to it) and accession by invitation (where the treaty expressly provides that non-signatory States may accede only upon the invitation of the Contracting Parties or of a body representative of the Contracting Parties which has been set up by the treaty). Many examples exist of treaty provisions where accession is by invitation only. Thus, Article 10 of the North Atlantic Treaty of 4 April 1949,[27] provides that:

> The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a party to the Treaty by depositing its instrument of accession with the Government of the United States of America.

Later members have all joined the alliance pursuant to Protocols to the North Atlantic Treaty by which the parties give their unanimous consent to the issue of an invitation to accede to the Treaty.

38.25 The nature of a treaty may be such that the Contracting Parties may wish to subject an invitation to a State to accede to conditions to be agreed between them and the State so invited. The best-known example of this kind is the European Union, the admission of a new member to which will of necessity require detailed negotiation between the existing Member States and the applicant State.

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25 1966 ILC Reports 32.

26 For example, under Article 84 of the Vienna Convention on the Law of Treaties itself, the Convention 'shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession'.

27 Treaty Series No 56 (1949), Cmd 7789.

Article 49 of the Treaty on European Union (Consolidated Version)[28] provides that:

> Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

38.26 Where a treaty is the constitutive instrument of an international organization, the admission of a new Member State (on such terms and conditions as the constitutive instrument may lay down) may be regarded as equivalent to accession. Thus, the Charter of the United Nations stipulates (Art. 4) that:

> 1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations.
> 2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

The applicant State is required to embody in its application a declaration, made in a formal instrument, that it accepts the obligations contained in the Charter; and, if the application is approved, membership becomes effective on the date on which the General Assembly takes its decision on the application.[29]

38.27 In cases such as these, where the constitutive treaties have their own inbuilt dynamic, accession (or admission) may be rendered possible on terms which put the new Member State in a different position from the other Contracting Parties, at least for a transitional period. Normally speaking, however, any State exercising the right of accession given to it in a treaty enjoys the same rights and becomes subject to the same obligations as the other Contracting Parties, whether original signatories or States which have subsequently acceded.

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[28] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>.

[29] Previously, once a favourable decision was taken by the General Assembly, membership became effective on the date on which the applicant state presented to the secretary-general an instrument of adherence. The first six new members (Afghanistan, Iceland, Pakistan, Sweden, Thailand, and Yemen) were admitted to membership of the United Nations in this way.

38.28 The question was discussed in the Assembly of the League of Nations in 1927 whether a State might properly express a purported instrument of accession as 'subject to ratification'. Present-day practice discourages this. In his role as depositary of multilateral treaties, the Secretary-General of the United Nations has long considered an instrument of accession declared to be subject to ratification 'simply as a notification of the government's intention to become a party'; he has drawn the attention of the government concerned to the fact that the instrument does not entitle it to become a party and underlines that 'it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the parties to the agreement and the other governments concerned notified to that effect'. The International Law Commission have expressed the view that the attitude adopted by the Secretary-General towards an instrument of accession expressed to be subject to ratification is 'entirely correct'.[30]

38.29 Which States may accede to a treaty? It would seem beyond dispute that no State, uninvited, has a right to make itself a party to a treaty by accession; accession can accordingly only take place when the original parties to the treaty consent, either generally by means of a provision in the treaty, or ad hoc, and only upon whatever conditions they may have laid down for accession. It was at one time suggested that a principle of universality required that all States should be entitled to participate in general multilateral treaties, defined for this purpose as treaties which concern general norms of international law or which deal with matters of general interest to States as a whole. A proposal to that effect advanced at the Vienna Conference on the Law of Treaties was, however, rejected by the Conference mainly on the ground that it ran contrary to the principle that States are, and should be, free to choose their treaty partners.[31]

38.30 International law prescribes no particular form for an instrument of accession, though the treaty itself may do so. An instrument of accession is a formal instrument, and it seems inconceivable that an oral communication would suffice. Accession is carried out in accordance with the procedure prescribed by the particular treaty, either by the deposit of a formal instrument of accession with the depositary government or authority indicated in the treaty, or by a notification in the form of a letter addressed to that government or authority.[32] The instrument or notification emanates from the executive authority of the State. It will enter into force on the

30 1966 ILC Reports 328. In the practice of the United Kingdom, an instrument of accession does not require ratification and is regarded constitutionally as equivalent to ratification.

31 Sinclair, 230–1; but see Nahlik, '*La Conférence de Vienne sur le droit des traités: Une vue d'ensemble*' in *Annuaire Français de Droit International* (1969) 48–9.

32 The UN Handbook (at paragraph 3.3.4) indicates that '[t]he Secretary-General, as depositary, has tended to treat instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned have been advised accordingly'.

date of deposit or notification, unless the treaty otherwise provides. Where the deposit or notification takes place before the date of entry into force of the treaty, the accession will not take effect unless and until the treaty itself enters into force.

Acceptance and Approval

38.31 Acceptance and approval, as alternative methods of participation in a multilateral treaty, may conveniently be considered together. Acceptance has quite recently become established in treaty practice as a new procedure for becoming a party to treaties. It is, as the International Law Commission rightly pointed out, 'an innovation which is more one of terminology than of method'.[33]

38.32 Where a treaty is made open to 'acceptance' without prior signature, the process is akin to accession. Thus, Article 14 of the Statute of The Hague Conference on Private International Law drawn up at The Hague between 9 and 31 October 1951[34] provides that:

> The present Statute shall be submitted for the acceptance of the Governments of the States which participated in one or more sessions of the Conference. It shall enter into force from the date that it is accepted by the majority of the States represented at the Seventh Session.
>
> The declaration of acceptance shall be deposited with the Netherlands Government, which shall inform the Governments referred to in the first paragraph of this Article.
>
> The same shall apply, in the case of the admission of a new State, to the declaration of acceptance of that State.

38.33 Reference to 'acceptance' as a method of participation in a treaty may also be found in the so-called 'triple option' clause to be found in many international conventions. An example is the Convention on the Intergovernmental Maritime Consultative Organization of 6 March 1948,[35] Article 57 of which provides that:

> . . . the present Convention shall remain open for signature or acceptance and States may become parties to the Convention by:
>
> (a) Signature without reservation as to acceptance;
>
> (b) Signature subject to acceptance followed by acceptance; or
>
> (c) Acceptance.
>
> Acceptance shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.[36]

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[33] 1966 ILC Reports 31.

[34] *Treaty Series* No 65 (1955), Cmd 9582.

[35] Now the Intergovernmental Maritime Organization (IMO); the consolidated text of the Convention as revised is available at <http://www.imo.org/>.

[36] Similar provisions can be found in other IMO Conventions.

38.34 The advantage of a provision for acceptance in a treaty is that it may enable the treaty to enter into force earlier than if the treaty had provided for 'ratification' as such. The constitutional procedures of some States require the assent of the legislature before a treaty can be formally ratified, and it may be possible to accomplish the process of 'acceptance' by executive action alone.[37]

38.35 What has been said above about 'acceptance' applies *mutatis mutandis* to 'approval', the introduction of which into the terminology of treaty-making is even more recent. 'Approval' appears more often in the form of 'signature subject to approval', where, according to Liang, approval is apparently used 'to indicate the approbation, by the process of municipal law, of the terms of a treaty, as contradistinguished from "acceptance" which is used to indicate the formal act evidencing the actual acceptance of the treaty by the State'.[38] The opening of a treaty to 'approval' without signature appears to be rare.[39]

[37] See Liang in (1950) 44 *AJIL* 342–9.
[38] Ibid, 346.
[39] 1966 ILC Reports 31.

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TREATIES AND OTHER INTERNATIONAL INSTRUMENTS—V RESERVATIONS, TERMINATION, REGISTRATION, TREATY SUCCESSION

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39.1 This chapter is devoted to certain miscellaneous aspects of the law of treaties, which are nonetheless important, and in some cases controversial. The treatment is inevitably somewhat technical, and non-lawyers may prefer to note the existence of difficulties without feeling obliged to explore the issues fully—much less to take a firm position where uncertainty exists. But it is important to grasp for instance what reservations are (and what they are not), and what effect they might have, questions that arise both when a treaty is under negotiation and after its conclusion. Similarly, claims by States to be freed from, or to bring an end to, their treaty obligations are a frequent source of international friction. Finally, treaty succession, which has come to have an increasing importance as nationalities go their own way and States break up, cannot be ignored by diplomats, for whom indeed it may have immediate consequences.

Reservations

39.2 Reservations are a peculiar, and somewhat anomalous, institution of the law of treaties, an institution which has given rise to as much difficulty in its practical implementation as controversy at the doctrinal level. The origins of the institution lie in the difficulty frequently encountered of securing the complete agreement of each negotiating party to every detail of a complex treaty text. When that happens, the choices may lie between watering down the final terms of the treaty to something below a worthwhile level of agreement; facing the possibility that one or more negotiating States may decline to (or be unable to) become party to the treaty; or trying to find a special accommodation to meet the demands of the dissenter or dissenters. If an accommodation of that kind can be found, and is incorporated in the treaty text, the problem falls away, as will be indicated below. If not, the tension will remain unresolved between the conflicting demands of the integrity of the treaty bargain, on the one hand, and the wish for widespread participation on the other. The institution of reservations is the attempt to mediate that tension.

39.3 The Vienna Convention on the Law of Treaties contains the following definition of a reservation:

> . . . a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State.[1]

It should be noted at once that the crux is the effect intended by the statement, not how it is described; and, secondly, that (as indicated by the deliberate choice of the word 'purports') it is not for the reserving State on its own to determine the ultimate effect of its reservation.

39.4 Ideally, the treaty will specify whether reservations can be made, and if so which ones, and it may also provide expressly for their legal consequences and for the procedure to be followed. To the extent that the treaty does so, the terms of the treaty will prevail. The practice of the Council of Europe affords a good illustration of the variety of reservations clauses that may be found in multilateral conventions, on the basis of agreement reached within the framework of the negotiations and then incorporated in the final treaty text.

39.5 Thus a reservations clause may be expressed in fairly general terms, but related closely to the contents of the particular treaty, for example the European

[1] Article 2.1(d).

Convention on the Peaceful Settlement of Disputes, 1957,[2] under Article 35 of which:

> 1. The High Contracting Parties may only make reservations which exclude from the application of this Convention disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories. If one of the High Contracting Parties has made a reservation, the other Parties may enforce the same reservation in regard to that Party.
> 2. Any reservation made shall, unless otherwise expressly stated, be deemed not to apply to the procedure of conciliation.

39.6 The best-known reservations clause of this type is however Article 57 of the European Convention on Human Rights:

> 1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
> 2. Any reservation made under this article shall contain a brief statement of the law concerned.[3]

39.7 Other reservations clauses may be expressed in more particular terms and even specify the precise reservations which are permissible. So, for example, under Article 3 of the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles, 1959,[4] the Contracting Parties are allowed to avail themselves of one or more of the reservations provided for in Annex II to the Convention, and Annex II then lists 16 precisely formulated reservations (for example, 'to exempt from compulsory insurance damages for pain and suffering').[5]

39.8 In other cases, the particular convention may prohibit reservations altogether. Thus, Article 39 of the European Convention on State Immunity, 1972, provides that '[n]o reservation is permitted to the present Convention'.[6]

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[2] <http://conventions.coe.int/Treaty/en/Treaties/Html/023.htm>.

[3] For the interpretation and application of these provisions by the European Court of Human Rights in the specific context of the Convention, see n 32 below.

[4] <http://conventions.coe.int/Treaty/en/Treaties/Html/029.htm>.

[5] A similar example is the European Convention providing for a Uniform Law on Arbitration, 1966 (<http://conventions.coe.int/Treaty/en/Treaties/Html/056.htm>), with 15 precise reservations. In certain cases, the right to reserve may be limited to particular states, as in the European Convention on the Place of Payment of Money Liabilities, 1972 (<http://conventions.coe.int/Treaty/en/Treaties/Html/075.htm>); here Article 7 and Annex II open a specific reservation to Italy and The Netherlands by name.

[6] <http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm>.

39.9 A similar provision prohibiting reservations altogether is now regularly to be found in major international treaties, as an expression of the fact that the integrity of the treaty bargain as a whole was regarded as a primary value by the negotiating States. This approach may be applied even to treaty texts of very great complexity, such as the Third United Nations Convention on the Law of the Sea, 1982,[7] or more recently the Statute of the International Criminal Court, 1998.[8] Here the thought is that the complex regime established by the treaty constitutes an intricate balance of concessions and compromises on all sides, so that to allow any one State to qualify the extent of its commitment on becoming party to it might well lead to others following suit, with the risk of unravelling the entire bargain between them.

39.10 However, in cases where the treaty does contain a clause of this kind expressly prohibiting the making of reservations, States may seek instead to attach 'interpretative declarations' to their expression of consent. Whether this amounts to an attempt to circumvent the prohibition on reservations depends, as has been seen,[9] on the intention and effect of the statement, not on its description. It is well established in international practice that States may, when signing or expressing consent to be bound, make formal written statements relating to the interpretation of the treaty or particular provisions in it, which the depositary is asked to circulate to all other signatory States.[10] As the Special Rapporteur of the International Law Commission put it, with reference to the definition of a reservation contained in the Vienna Convention on the Law of Treaties:

> The . . . Commission had taken cognizance of the existence of declarations as to interpretation and had accordingly drafted [the definition] in its present form. Some such declarations were of a general nature and represented an objective interpretation of what was understood to be the meaning of a treaty. The purpose of others was to clarify the meaning of doubtful clauses or of clauses which were controversial for certain States. Others again dealt with the application of a treaty in certain circumstances peculiar to a State. The Commission had considered that reservations should be understood to mean declarations which purported to exclude or vary the legal effect of certain provisions in their application to a particular State. That question called for thorough examination, but the Conference should

7 1833 UNTS 3.

8 2187 UNTS 3.

9 Paragraph **39**.3 above.

10 It may also be that the terms of such declarations will have been discussed and even accepted at the conference which drew up the treaty; so, for example, the Treaty of Nice of the European Union has annexed to its official publication 24 common Declarations adopted by the Conference, and three national Declarations 'of which the Conference took note'; see <http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf>.

be very cautious about the application of the term 'reservations' to declarations as to interpretation in general.[11]

39.11 That notwithstanding, it may sometimes be difficult, when a State makes an interpretative statement or declaration of this kind on expressing its consent to be bound by a treaty, to distinguish it from a reservation;[12] and while, in principle, interpretative statements or declarations are not subject to the legal regime applicable to reservations as such, the International Law Commission has found it necessary to devote a section of its continuing study of the subject[13] to them. The Commission contemplates the application to interpretative declarations of a regime which would in certain respects apply to them rules analogous to those applying to reservations, but without amalgamating the one with the other. A particular example is what the Commission calls 'conditional interpretative declarations', by which a State conditions its acceptance of the treaty on its being interpreted in a specified way; a declaration of this kind can be indistinguishable from a reservation.[14]

39.12 Where the particular treaty contains its own reservations clause, questions concerning the legal effect of reservations made to that treaty will in the first instance be governed by the terms of that clause, taken in its context in the treaty as a whole; and it is only when the terms of the treaty are ambiguous or unclear, or when the reservations clause is not comprehensive, that reference may have to be made to the rules of general international law about the formulation of reservations and their legal effect. These rules have however been the subject of great controversy for more than 50 years, and the controversy shows no signs of abating. It is now clear that the areas of current controversy go far wider than the case of those multilateral conventions which contain no reservations clause, and extend also to the role and effect of the objection (or lack of objection) by other parties to a reservation formulated by a would-be party; to the legal effect of reservations once validly established; and even to whether different rules apply, or should apply, to reservations to treaties of different types.

39.13 It may be said at the outset, however, that the question of reservations does not in principle arise in the case of *bilateral* treaties, since it is generally accepted that

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11 Sir Humphrey Waldock, United Nations Conference on the Law of Treaties, *Official Records, First Session,* 34.

12 See the analysis by Nelson (2001) *ICLQ* 767, of 'disguised reservations' to the UN Convention on the Law of the Sea, which (see paragraph **39**.9 above) does not permit reservations; for the texts of formal objections taken by other states to declarations of this kind, see <http://treaties.un.org/Pages/ParticipationStatus.aspx> Ch.XI.

13 See paragraph **39**.25 below. See also the description of EU practice by E Denza, in C Stefanou and H Xanthaki (eds), *Drafting Legislation, A Modern Approach*, (Ashgate, 2008) 238.

14 13th Report of the ILC's Special Rapporteur, 2008, UN Doc. A/CN.4/600.

an attempt by one of the two negotiating States unilaterally to vary the terms of the agreed text after the conclusion of the negotiations will simply mean that negotiations will have to be resumed until agreement can be reached on the text. As Reuter puts it:[15]

> En effet, bien que techniquement possible pour un traité bilatéral, la 'réserve' ne constitue pas dans le cadre de ce dernier une figure juridique pratique, ni originale, car elle se ramène à rouvrir après leur clôture les négociations.

39.14 That said, the tendency in recent years for the United States Senate to attach, even in the case of bilateral treaties, what it terms 'reservations' as the condition for giving its constitutional 'advice and consent' to ratification has given rise to particular problems, the solution to which is not always straightforward. In the case of the Supplementary Extradition Treaty with the United Kingdom of 1985,[16] Aust describes what happened as follows:

> The US Senate approved [the Treaty] on condition that certain amendments were made. The US Government having informed the UK Government of this, it was decided to amend the treaty by an exchange of notes. The US note recorded the Senate's condition and attached the articles of the Treaty as they would read if so amended. The note explained that the US President could not execute the instrument of ratification unless the amendments were made, and asked if they would be acceptable to the UK Government. The UK note confirmed that the amendments were acceptable and instruments of ratification were finally exchanged in December 1986.[17]

The traditional view

39.15 Traditionally, the generally accepted view was that a State which sought subsequently to attach a reservation to a multilateral convention the text of which had been established *ne varietur* could only do so with the assent of the other parties or potential parties to the convention. This view was based inter alia on the practice of the League of Nations.[18]

39.16 There was however an inner link between the unanimity rule for the adoption of the *text* of a multilateral convention and the unanimity rule for the admissibility of reservations to that text. So long as it was accepted that the text of a multilateral convention could be established only by the unanimous agreement of the

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15 *Introduction au droit des traités* (3rd revised edn, Geneva: ed. Cahier, PUF, 1995) 72.

16 1556 UNTS 369.

17 A Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge: Cambridge University Press, 2007) 132.

18 See the Report of June 1927 by the Committee of Experts for the Progressive Codification of International Law, League of Nations Document C.212: 1927 V: the full text is published in McNair, *Law of Treaties*, 173–7.

participating States, so long was it understood that subsequent reservations to that text required, in order to be accepted as valid, the unanimous consent of the parties to the convention. However, with the weakening of the unanimity rule, including at international treaty-making conferences,[19] later accelerated under the practical impact of the enormous increase in the size of the international community of States from the 1960s onwards, it was inevitable that the foundations for the unanimity rule for reservations would be called into question.

The Genocide Convention case

39.17 The traditional unanimity rule governing the admissibility of reservations to multilateral conventions had been applied in the depositary practice of the League of Nations Secretariat and was taken over by the Secretariat of the United Nations.[20] The traditional rule was not, however, universally accepted. A small number of States, notably the Soviet Union and its allies, laid claim to a principle that every State has a sovereign right to make reservations at will and unilaterally, and to become a party to treaties subject to such reservations, even against the objection of other Contracting States. A larger group of Latin-American States applied a more flexible system based upon a resolution of 1932 by the Governing Board of the Pan-American Union, which would allow a treaty to come into force between a reserving State and other parties which accepted the reservation, but not between it and parties which did not accept the reservation.[21]

39.18 Matters came to a head in 1950 over the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention'), which contains no provision governing reservations and had attracted a certain number of reservations to which other States had objected on the grounds that the reservations were impermissible.[22] The United Nations secretary-general, as depositary for the Convention, was in a quandary as to whether to count the ratifications subject to these reservations towards the number required for the Convention to enter into force, and the General Assembly decided to seek an advisory opinion from the International Court of Justice on certain questions, including whether a reserving State could be regarded as being a party to the Convention if its reservation is objected to by some parties to the Convention but not by

[19] The Vienna Convention lays down, in Article 9.2, a general two-thirds majority rule for the adoption of the text of a treaty at an international conference.

[20] See the Secretary-General's Report to the General Assembly of 20 September 1950 on Reservations to Multilateral Conventions, UN Doc. A/1372.

[21] See the historical summary in *ILC Yearbook* 1962, Vol 2, 73–80.

[22] It is of some historical interest to note that the reservations were to the provision (Article IX) conferring jurisdiction over disputes on the International Court of Justice, and that, after the fall of communism in the 1990s the majority of the reservations in question were withdrawn.

others; and, if so, what the effect of the reservation would be as between the reserving State and objecting parties, on the one hand, and accepting parties, on the other. The Court in due course pronounced, by a narrow majority, in the following Delphic terms:[23]

> that a state which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that state cannot be regarded as being a party to the Convention;
>
> that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving state is not a party to the Convention . . . if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving state is a party to the Convention.

Developments subsequent to the Genocide Convention case

39.19 Simultaneously with seeking the Advisory Opinion, the General Assembly had invited the International Law Commission to study the question of reservations to multilateral conventions urgently. In its first report, in 1951, the Commission took the view that the 'compatibility' criterion, as formulated by the International Court, was too subjective and not suitable for application to multilateral conventions in general.[24] In addition, so long as the application of the criterion of compatibility remained a matter of subjective discretion, if some parties were willing to accept a reservation and others not, the status of a reserving State in relation to the convention would remain uncertain; and this could throw doubt on the status of the Convention itself.[25]

39.20 The Commission's recommendation to retain the unanimity rule met with a mixed reception in the United Nations General Assembly, and, in the context of its continuing work on the draft of the Vienna Convention, the Commission ultimately reached the conclusion that 'the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable',[26] and aligned itself with the view that, where the treaty is silent in regard to reservations, the International Court's principle of

[23] 1951 ICJ Reports 15.

[24] 1951 ILC Reports 5.

[25] Precisely the point that had led to the request for an Advisory Opinion in relation to the Genocide Convention; see above.

[26] 1966 ILC Reports 37.

'compatibility with the object and purpose of the treaty' was suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties. The difficulty lay rather, the Commission thought, in the process by which that principle was to be applied, especially where there is no tribunal or other organ vested with standing competence to interpret the treaty.[27]

39.21 After considering various possible solutions, including a 'collegiate' system under which the reserving State would only become a party to the treaty if the reservation were accepted by a given proportion of the other States concerned, the Commission came down in favour of 'a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States'.[28] This is the system which, with minor modifications, is now embodied in the Vienna Convention on the Law of Treaties.

Reservations in the Vienna Convention on the Law of Treaties

39.22 The regime on reservations is set out in Articles 19–23 of the Vienna Convention. Articles 19–21 are the most significant and warrant being set out in full:

> Article 19
>
> *Formulation of reservations*
>
> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
>
> (a) the reservation is prohibited by the treaty;
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made, or
> (c) in cases not falling under sub-paragraphs (a) and (b) the reservation is incompatible with the object and purpose of the treaty.
>
> Article 20
>
> *Acceptance of and objection to reservations*
>
> 1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
> 2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
> 3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

[27] *ILC Yearbook* 1962, Vol 2, 178–9.
[28] Ibid, 180.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
   (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with Articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se.*
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

39.23 Broadly speaking, this corresponds to the 'flexible' system proposed by the Commission in 1962. The most significant departure from the Commission's proposals is the reversal of the rule concerning the legal effect of an objection to a reservation (Article 20.4(b)). The Commission had proposed that an objection to a reservation should preclude the entry into force of a treaty as between the objecting and reserving States unless a contrary intention was expressed by the objecting State, whereas the Conference[29] put the onus on the objecting State to declare positively that its objection had the effect of precluding the entry into force of the treaty between the two States.[30]

[29] On the basis of a proposal by the Soviet Union, the main proponent of a unilateral right to make reservations; see paragraph **39.**17 above.

[30] I M Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984) 62–3.

Comment

39.24 Since the entry into force of the Vienna Convention in 1980, and despite the widespread effect of its provisions on shaping the development of the general law of treaties, the controversy surrounding the making of reservations, and the rules regulating them, has continued. State practice has not settled down into a uniform pattern, and some of the bodies created to exercise a monitoring or adjudicatory role under certain Conventions on human rights have adopted decisions that are not entirely consistent with one another, and which in addition have been criticized by States Parties to those Conventions.[31]

39.25 In 1993, the UN General Assembly took note of these continuing difficulties and misunderstandings and endorsed the proposal that the International Law Commission should be tasked with reporting once more on the law and practice relating to reservations. Since then, the Commission's Special Rapporteur has produced no less than thirteen reports on the subject. The Commission noted at the outset that the Vienna Conventions of 1969 and 1986 set out some principles concerning reservations to treaties, but

> did so in terms that were too general to act as a guide for State practice and left a number of important matters in the dark. These conventions provide ambiguous answers to the questions of differentiating between reservations and declarations of interpretation, the scope of declarations of interpretation, the validity of reservations (the conditions for the lawfulness of reservations and their applicability to another State) and the regime of objections to reservations (in particular, the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose). These conventions are also silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties (in particular the constituent instruments of international organizations and human rights treaties), reservations to codification treaties and problems resulting from particular treaty techniques.[32]

However the Commission shows no sign of being able to bring its work on the topic to an early conclusion, and to submit recommendations to the General Assembly for future action. It therefore remains an open question how the General Assembly might at that point decide to respond, though it seems unlikely that the Assembly would consider the adoption of a third Vienna Convention

[31] See in particular the Judgments of the European Court of Human Rights in the *Belilos* ((1988) 10 EHRR 466) and *Louizidou* ((1995) 20 EHRR 99) cases, drawing on the special character of the European human rights regime. On the wider canvas, see General Comment No 24, adopted in 1994 by the Committee under the International Covenant on Civil and Political Rights, (http://www2.ohchr.org/english/bodies/hrc/comments.htm), and the strong reactions it called forth from France, the United States and the United Kingdom, as well as the comments thereon of the ILC's Special Rapporteur in his second Report (1996), Document A/CN.4/477/Add.1.

[32] See 1993 ILC Reports, at paragraphs 428 *et seq*.

on the subject, given the yet further legal problems that this would give rise to in attempting to assess its relationship to the earlier Conventions.

Termination

39.26 A treaty continues to have operative effect for any party to it so long as it remains in force generally or for the party concerned. A treaty remains in force generally so long as it has not come to an end, either automatically by virtue of a provision in the treaty concerning expiry or lapse, or at any time by consent of all the parties. Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event. All these are examples of treaties which come to an end by operation of their own terms; they are perhaps more accurately characterized as examples of *expiry* clauses than of *termination* clauses.

39.27 As to termination proper (that is, action by one or more of the Contracting Parties to bring to an end a treaty still in force), there are, as so often, two cases: termination through the application of a treaty's own provisions, and termination in circumstances not specifically provided for. A further important distinction is between termination of the treaty as a whole, and termination only of a given party's participation in the treaty.

Termination of a treaty through the application of its own provisions

39.28 The majority of modern treaties contain clauses which provide for a right to denounce[33] or withdraw from the treaty upon the giving of a specified period of notice. Sometimes it is a case of an open right to give notice of withdrawal at will, in others the right is conditioned by the presence of particular circumstances (see further below). In all these cases however the termination of the treaty or the termination of the participation of a Contracting Party in the treaty is brought about by operation of the treaty itself, and when this may happen is essentially a question of interpreting and applying the treaty. As the International Law Commission pointed out:

> The treaty clauses are very varied. Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolutory condition . . . More common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide

[33] A terminology which is open to misunderstanding on the part of the lay audience; 'denunciation' is simply a lawyer's term of art meaning withdrawal, and does not carry any necessary connotation of condemnation.

> for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation or withdrawal on six or twelve months' notice, or of a renewal of the treaty for successive periods of years subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration allows a right of denunciation or withdrawal even during the currency of the period.[34]

39.29 It will accordingly be seen that withdrawal or denunciation clauses may vary widely in their form and effect. Examples of the types of clauses which may be found in modern treaties can be found in Aust.[35] These illustrate the more usual forms of withdrawal or denunciation clause currently in use.

39.30 In particular cases (and this depends essentially upon the nature of the treaty in question), a party wishing to exercise a right of withdrawal or denunciation may have to show special cause. Thus, a series of important treaties in the field of arms control contain similar clauses covering the right of withdrawal for special cause, eg Article X.1 of the Non-Proliferation Treaty:

> Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.[36]

39.31 Practice under these special clauses is sparse. However, in 1993 North Korea (the Democratic People's Republic of Korea) did give notice of withdrawal from the Non-Proliferation Treaty under this provision, citing as justification certain activities of the United States of America on the one hand and the International Atomic Energy Agency (IAEA) on the other.[37] Following a statement issued jointly by the United Kingdom, the United States, and the Russian Federation, as the depositaries of the Treaty, which called this justification into doubt, the United Nations Security Council adopted a resolution calling on North Korea to reconsider its announcement 'and thus to reaffirm its commitment to the Treaty'.[38] The resolution also urged all Member States to encourage North Korea

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34 1966 ILC Reports 78.

35 At 278 *et seq*.

36 729 UNTS 169.

37 The account which follows is based on the rather fuller treatment in Aust, *Modern Treaty Law and Practice*, 282.

38 SC resolution 825 (1993) of 11 May 1993.

to respond positively. In due course, an announcement was made of North Korea's decision 'to suspend . . . the effectuation of its withdrawal', but 10 years later North Korea claimed to reactivate its withdrawal forthwith in response to a resolution adopted by the Board of Governors of the IAEA. North Korea is currently subject to economic sanctions imposed by the Security Council in this connection.

Termination of a treaty containing no termination clause

39.32 Even if a treaty contains no express provisions governing its expiry or conferring a party right of withdrawal, it can still be terminated at any time by consent of all the parties.[39]

39.33 More controversial is the question whether, and if so in what circumstances and subject to what conditions, a State has the right unilaterally to terminate its participation in a treaty which contains no provision for withdrawal or denunciation.

39.34 McNair talks in terms of a presumption against unilateral termination:

> . . . the normal basis of approach adopted in the United Kingdom and, it is believed, in most States, towards a treaty is that it is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly or by implication, it contains a right of unilateral termination or some other provision for its coming to an end. There is nothing juridically impossible in the existence of a treaty creating obligations which are incapable of termination except by the agreement of all parties.[40]

If such a presumption exists, it is not an absolute one, since there may be evidence that the treaty parties intended to admit a right of withdrawal on notice; or the nature of the treaty itself may be such as to imply the existence of such a right. Article 56.1 of the Vienna Convention accordingly provides that:

> [a] treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

39.35 While these principles are generally accepted, it is more difficult to specify which treaties are of such a nature as to imply the existence of a right of

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39 Article 54(b) of the Vienna Convention on the Law of Treaties.

40 At 493–4.

unilateral denunciation.[41] One example frequently cited is treaties of alliance, on the basis that they can be presumed not to have been intended for all eternity. Another is commercial or trade treaties. Yet it is easier to suggest general categories in this way than it is to tie them firmly to State practice, in view of the fact that some alliances (for example, the North Atlantic Alliance (NATO)) are clearly intended to be of long duration, as indeed are some treaty relationships in the trade and economic fields (for example, the European Union). Moreover it is nowadays a virtually universal practice to include in treaties a duration or termination clause.[42]

39.36 An interesting example of the handling of matters of this kind is provided by Indonesia's purported withdrawal from the United Nations in 1965, in protest against the election of Malaysia to a non-permanent seat on the Security Council. The Charter of the United Nations does not contain any express provision regulating the question of withdrawal from the organization. It is nevertheless clear from the records of the San Francisco Conference that the founding members intended to concede the right to withdraw in exceptional circumstances,[43] as appears from the commentary of the competent Committee at the San Francisco Conference:

> The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their co-operation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization. . . . Nor would a Member be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.[44]

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[41] See Widdows, 'The unilateral denunciation of treaties containing no denunciation clause', 53 *BYIL* 83.

[42] Although EU Treaties tend to be concluded 'for an unlimited period'; eg Article 3 of the Treaty of Lisbon of 13 December 2007 (<http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/12007L.html>).

[43] *Bowett's Law of International Institutions* (eds Sands and Klein)(5th edn, London: Sweet and Maxwell, 2001) 548; H G Schermers, *International Institutional Law* (4th revised edn, Boston: Martinus Nijhoff, 2003) 100–1; L M Goodrich, A P Hambro, and E Simons, *Charter of the United Nations* (3rd edn, New York, 1969) 74–6.

[44] 7 UNCIO 267. For differing views as to the status and legal effect of this commentary on withdrawal, see H Kelsen, *Law of the United Nations,* 127; H Rolin, *Annuaire de l'Institut de Droit International* (1961), Vol 1, 237; and Goodrich, Simons, and Hambro, *Charter of the United Nations*, 75.

39.37 Against this background, the secretary-general sent a carefully considered reply to the Indonesian letter which referred to the absence of express provision in the Charter and to the declaration of the San Francisco Conference, and concluded by expressing, in carefully chosen words:

> . . . both the profound regret which is widely felt in the United Nations that Indonesia has found it necessary to adopt the course of action outlined in your letter and the earnest hope that in due time it will resume full co-operation with the United Nations.[45]

39.38 In a Note of 8 March 1965,[46] the United Kingdom placed on record that the reason advanced in the Indonesian letter 'is not a circumstance so exceptional in nature as to justify the Government of Indonesia in withdrawing from the Organization', and an Italian Note of 13 May 1965[47] expressed in more general terms the view that the San Francisco commentary was 'not entirely adequate' since it neither contained any definition of the circumstances which might justify withdrawal nor specified any procedure for determining those circumstances in the future. On 19 September 1966, the Indonesian ambassador to the United States addressed a telegram to the secretary-general in which, with reference to the Indonesian letter and the secretary-general's reply, he informed the secretary-general that the Indonesian government 'has decided to resume full co-operation with the United Nations and to resume participation in its activities starting with the Twenty-first session of the General Assembly',[48] and on 28 September, the president of the General Assembly reported to the Assembly, following discussions with the Indonesian foreign minister and the secretary-general:

> It would therefore appear that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the Organization but upon a cessation of cooperation. The action so far taken by the United Nations on this matter would not appear to preclude this view. If this is also the general view of the membership, the Secretary-General would give instructions for the necessary administrative actions to be taken for Indonesia to participate again in the proceedings of the Organization. It may be assumed that, from the time that Indonesia resumes participation, it will meet in full its budgetary obligations. If it is the general view that the bond of membership has continued throughout the period of non-participation, it would be the intention of the Secretary-General to negotiate an appropriate payment with the representatives of Indonesia for that period and to report the outcome of his negotiations to the Fifth Committee for its consideration.[49]

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45 UN Doc. A/5899; S/6202 of 26 February 1965.
46 UN Doc. A/5911; S/6229 of 12 March 1965.
47 UN Doc. A/5914; S/6356 of 17 May 1965. The Note is reproduced in *ILM* (1965), Vol 4, 774.
48 UN Doc. A/6419; S/6498 of 19 September 1966.
49 UN Doc A/PV. 1420 of 28 September 1966.

No objection having been raised to the president's statement, the representatives of Indonesia were invited to take their seats in the General Assembly, and the secretary-general took action on the lines suggested.[50]

39.39 But if controversy surrounds the asserted right of unilateral withdrawal from or denunciation of a treaty which contains no provision on withdrawal or denunciation, controversy equally surrounds the questions of what other grounds a party may invoke for terminating or withdrawing from a treaty. The Vienna Convention on the Law of Treaties lists three possible grounds of this nature, namely, breach, impossibility of performance, and fundamental change of circumstances.[51]

39.40 A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.[52] As regards multilateral treaties, a material breach by one of the parties entitles the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either in the relations between themselves and the defaulting State, or as between all the parties. Irrespective of whether that happens or not, a party which is specially affected by the breach may invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. In addition, if the treaty is of such a character that a material breach of its provisions by one party 'radically changes the position of every party with respect to the further performance of its obligations under the treaty', any party other than the defaulting State will have the right to invoke the breach as a ground for suspending the operation of the treaty with respect to itself.[53]

39.41 In its Advisory Opinion in the *Namibia* (South West Africa) case,[54] the Court approved these rules as constituting in many respects a codification of customary law, to the effect that only a material breach of a treaty justifies termination, such breach being defined as: 'a repudiation of the treaty not sanctioned by the Vienna Convention; or the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. The Court went on to hold that the General Assembly had determined, by resolution 2145(XXI), that both forms

[50] See generally, Livingstone, 'Withdrawal from the United Nations—Indonesia', 1965 *ICLQ* 637.

[51] A treaty may also be considered as terminated by operation of law if all the parties to it conclude a later treaty relating to the same subject matter which is so far incompatible with the earlier one that they must be considered to have intended to abrogate it (Article 59 of the Vienna Convention).

[52] Ibid, Article 60.1.

[53] Ibid, Article 60.2.

[54] 1971 ICJ Reports 16.

of material breach had occurred in this case, and that in stressing that South Africa 'has in effect disavowed the Mandate', the General Assembly found that it had in fact repudiated it, and concluded finally that: '[t]he resolution in question is therefore to be viewed as the exercise of the right to determine a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship'.[55]

Impossibility of performance

39.42 Article 61.1 of the Vienna Convention on the Law of Treaties stipulates that:

> A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

The usual examples given of the rare cases of supervening impossibility of performance are 'the submergence of an island, the drying up of a river or the destruction of a dam or hydroelectric installation indispensable for the execution of a treaty'.[56]

39.43 Naturally, impossibility of performance may not be invoked by a party if the impossibility is the result of a breach by that party of an obligation under the treaty or any other international obligation owed to any other party to the treaty.[57]

Fundamental change of circumstances

39.44 Linked with the concept of supervening impossibility of performance, but much more controversial in its formulation and application, is the doctrine that political (as opposed to physical) changes of circumstances may be invoked as a ground for terminating a treaty. This is the so-called doctrine of *rebus sic stantibus.* It is spelt out, in suitably restrictive terms, in Article 62.1 of the Vienna Convention:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the

[55] Ibid, 47. But note the dissenting view of Judge Fitzmaurice that the South African attitude was not equivalent to a disavowal of the Mandate, loc cit, 300. See also H W Briggs, 'Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice' (1974) 68 *AJIL* 51–68.

[56] 1966 ILC Reports 84.

[57] Article 61.2.

parties, may not be invoked as a ground for terminating or withdrawing from a treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

The remaining paragraphs of the Article then go on to make plain that the doctrine may not be invoked in respect of a treaty which establishes a boundary or if the change of circumstances results from a breach by the party invoking it either of the treaty or of any other international obligation.

39.45 There have been relatively few cases in which the doctrine of *rebus sic stantibus* has been invoked before an international tribunal and in no case has the right to terminate a treaty on the ground of fundamental change of circumstances been upheld. When the International Court of Justice was confronted with an Icelandic contention that, owing to changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland a 1961 exchange of Notes was no longer applicable, the Court acknowledged the validity of the principle, but held that:

> . . . the alleged changes could not affect in the least the obligation to submit to the Court's jurisdiction, which is the only issue at the present stage of the proceedings. It follows that the apprehended dangers for the vital interests of Iceland, resulting from changes in fishing techniques, cannot constitute a fundamental change with respect to the lapse or subsistence of the compromissory clauses establishing the Court's jurisdiction.[58]

39.46 The Court also declined to accept that the change of circumstances invoked by Iceland had resulted in a radical transformation of the extent of obligations still to be performed, pointing out that:

> The present dispute is exactly of the character anticipated in the compromissory clauses of the Exchange of Notes. Not only has the jurisdictional obligation not been radically transformed in its extent; it has remained precisely what it was in 1961.[59]

39.47 Finally, the Court referred favourably to a United Kingdom argument that the doctrine of change of circumstances never operates so as to extinguish a treaty automatically or to allow an unchallengeable unilateral denunciation by one party; it only operates 'to submit the dispute to some organ or body competent to determine whether the conditions for the operation of the doctrine are present'. In commenting on this argument, the Court noted that, in the instant case, 'the

[58] *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) 1973 ICJ Reports 3, at 20.
[59] Ibid, 21.

procedural complement to the doctrine of changed circumstances is already provided for in the 1961 Exchange of Notes'.[60]

Procedure for termination

39.48 A notice of termination, withdrawal, or denunciation ('notice') is a formal notification from the competent authority of the State concerned and communicated through the diplomatic channel to the other party or parties to the treaty or to such depositary government or authority as the treaty may specify. Any notice given under a treaty must comply with the conditions specified in the treaty. It is not sufficient to announce termination or withdrawal or to publish a notice of it in the press.

39.49 Notices take effect only with their formal communication as above, and any period to which the notice is subject runs from then. Unless the treaty provides otherwise, notices must be unconditional, and will apply automatically to all annexes, protocols, Notes, letters, and declarations attached to the treaty and forming an integral part of it.

39.50 Unless the treaty provides otherwise, a notice may be withdrawn or revoked at any time before it takes effect provided that the withdrawal or revocation is consented to by any other party which, in consequence of the original notice, has itself given notice of termination or has otherwise changed its position.

39.51 Where notice is given in accordance with the terms of the treaty itself, the notice may or may not be accompanied by a statement of the reasons.[61]

Registration[62]

39.52 Article 102 of the Charter of the United Nations requires that:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

39.53 In 1946 the General Assembly adopted a set of Regulations to give effect to Article 102, subsequently amended; their current contents are more fully explained

60 *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) 1973 ICJ Reports 3, at 21.

61 But see paragraph **39**.30–**39**.31 above.

62 This section should be read together with the discussion in Chapter **35** of what constitutes a treaty in international law.

in Section 5 of the UN Treaty Handbook.[63] Under Article 10 of the Regulations, the Secretariat accepts for 'filing and recording' treaties or international agreements voluntarily submitted to it which are not subject to registration under Article 102 or under the Regulations. The direct obligation falling on the Secretariat under Article 102 to publish treaties registered with it was met by the creation of the United Nations Treaty Series, the most comprehensive collection of treaty texts and related information in publication, now running to over 2,000 volumes containing more than 150,000 entries.[64]

Treaty Succession

39.54 Finally, a word needs to be said about treaty succession, a subject which has gained in importance in recent decades. Whenever a change takes place in the international status of a particular territory (or, to put the matter more precisely, when one State is replaced by another in the responsibility for the international relations of a particular territory), questions are bound to arise in regard to the effect of this change on the status of treaties that formerly applied to the territory, or at least its effect in regard to legal relations under such treaties. The subject is known as treaty succession, and is itself merely one aspect of State succession more generally.[65] The situations that may give rise to a succession of States are classified in a United Nations Convention of 1978 on Succession of States in respect of Treaties,[66] as the transfer of territory from one State to another, the case where two or more States unite into one successor State, and the case when 'a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist'. The Convention (which did not enter into force until 1996; see further below) also devotes considerable attention to what it refers to as 'newly independent States', ie territories that had previously been colonial dependencies, a situation that attracted much international attention at the time, but is now of far less practical interest.

39.55 Unlike the Vienna Convention on the Law of Treaties itself, the 1978 Succession Convention cannot be regarded as an expression of the generally accepted law and practice in this area. It has only 22 parties, of whom eight are accounted for

63 See Chapter **35** n 1.

64 See further <http://treaties.un.org/Pages/Publications.aspx?pathpub=Publication/UNTS/Page1_en.xml> which offers a direct link to the Treaty Series itself.

65 Questions of an equivalent kind arise in respect of the property of the State in all its forms, the liabilities of the State (including its debts), and the ownership of and access to historical, archival, and cultural materials.

66 1946 UNTS 3.

by States emerging from the break-up of the former Yugoslavia, together with the Czech Republic and Slovakia, and none of the leading States has shown interest in becoming party to it. Whereas the Convention sought to diminish the role either of agreements reached between predecessor and successor States for the assumption of treaty obligations in anticipation of the succession, or of general declarations made by the successor State to the same effect after the event, international practice has shown itself to be characterized by a far greater degree of pragmatic flexibility. The Convention favoured, in essence a 'clean slate' for newly independent States (as defined above), by contrast with substantial continuity in the cases of the uniting and separating of States.[67] The particular case of decolonization aside, the needs of international life have shown the great desirability of mechanisms by which successor States can express a position in respect of their treaty relations, to which other treaty parties can then react, whether by way of express acceptance, tacit acquiescence, or (where the case demands) formal refusal, and the treaty depositary may have an important administrative role to play in this process, especially when the depositary function is carried out by an international organization.[68] In some practical respects, the attainment of clarity may be as important as establishing whether treaty relations do continue to subsist. In summary, rather than a rigid reliance on abstract rules, practice has favoured empirically derived outcomes case by case, in which subsequent consent or acquiescence by the States concerned has played a substantial role. This is as one would have expected, given that agreement represents the fundamental basis for treaty relations in general.

39.56 It is generally accepted, however, that a succession of States has no effect on boundary regimes or other territorial régimes, and this rule is reflected in Articles 11 and 12 of the Succession Convention.[69]

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[67] Though the continuity was qualified, for uniting States, by the proviso that the application of inherited treaties would remain limited to the territory to which they originally applied, in other words not to the entire territory of the new State, a limitation that was found particularly difficult to accept in the case of Germany; see further below.

[68] Though this may in turn require a more active role than the purely neutral and mechanical one that many depositaries had come to accustom themselves to playing.

[69] It has also been suggested, notably by monitoring bodies under these instruments, that human rights treaties have a special character, in that their purpose and effect is to guarantee fundamental rights for the benefit of individuals, and that 'once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant': General Comment No 26 of 8 December 1997 by the Committee under the International Covenant on Civil and Political Rights (Document CCPR/C/21/Rev.1/Add.8/Rev.1, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/06b6d70077b4df2c8025655400387939?Opendocument)>.

Conversely, highly personal and highly political treaties are prone to expire rather than to be continued. A special rule also applies to membership of international organizations, where in principle membership cannot be inherited, even though it has as its formal origin the Member State's becoming party to the treaty which forms the constitutive instrument of the organization. Therefore, where two States unite, both of whom had been members of an international organization, their membership can be merged into the membership of the new State, but the process does not operate in reverse; on a separation of States, it would normally be expected that the new State (or States) would apply for membership in its (or their) own name. **39.57**

There is however an important qualification to the above, which has come into focus latterly with the disintegration of composite States, notably the former Socialist Federal Republic of Yugoslavia and the former Union of Soviet Socialist Republics, but also in a more limited way the former Republic of Czechoslovakia. In such cases, it may be possible to discern (though this is not always so) that there is a single central sovereignty that has been maintained, through the accretion originally of additional territorial units, and later through their loss. In a case of this kind, one can speak of a 'continuing State' (sometimes referred to as 'continuator State') which will have a different status for succession purposes than the other territorial entities, whose treaty relations will be determined as 'successor States'. The distinction can be of fundamental importance. It explains, for example, why the Russian Federation was able, by simple notification, not merely to continue the membership of the Soviet Union in the United Nations, but to assume the special prerogatives of a permanent member of the Security Council. It explains also how the Russian Federation retained the special status of nuclear-weapon State under the Treaty on the Non-Proliferation of Nuclear Weapons, while the other component parts of the former Soviet Union either succeeded or acceded to the Treaty as non-nuclear-weapon States. Contrast the outcome of the dissolution of the former Yugoslavia, where in a series of cases, the International Court of Justice has noted (without pronouncing definitively on them) the doubts remaining over membership in the United Nations of the rump State entitled 'Federal Republic of Yugoslavia (FRY)' until the eventual admission of the State of Serbia and Montenegro as a new member on 1 November 2000. The Court nevertheless decided, on the one hand, that it could proceed with cases brought before that date by or against the FRY; conversely that, after the separation of Montenegro, a case pending against Serbia and Montenegro should proceed against Serbia alone.[70] **39.58**

[70] *Legality of Use of Force (Yugoslavia v United Kingdom)* 1999 ICJ Reports 826, later *sub nom. Serbia and Montenegro v United Kingdom* 2004 ICJ Reports 1307; *Case Concerning Application of the*

39.59 Two other cases of special interest should be noted. One is the eventual reunification of Germany in 1990, after close on half a century during which the eastern part of Germany had gradually acquired recognition of separate statehood as the 'German Democratic Republic' (GDR). Although the GDR ultimately acceded to the Federal Republic of Germany under the latter's Constitution, this was done on the basis of a treaty between the two States, which in turn made specific provision for treaty succession: the Federal Republic's treaties would in principle continue, and be extended to the entire territory (subject where necessary to consultations with the other treaty parties), whereas all the GDR's treaties were to be subject to discussion with the other parties 'with a view to regulating or confirming their continued application, adjustment or expiry'. It would seem that discussions took place with 135 treaty partners, and that the outcome was to discard or disapply the overwhelming proportion of the GDR's very substantial corpus of treaties.[71]

39.60 The second case of special interest is that of Hong Kong. The Sino-British Joint Declaration of 19 December 1984, which laid the ground for the return of Hong Kong to Chinese sovereignty in 1997, stipulated that Hong Kong would be enabled to conduct within limits its own external relations, including the power to conclude international agreements, using the name 'Hong Kong, China'. As spelled out more fully in Annex 1 to the Joint Declaration and in the Basic Law (enacted by China—though in agreed terms—to serve as the constitutional instrument for the Hong Kong Special Administrative Region), this international capacity was to include both the continued application to Hong Kong of international agreements concluded before the handover and also Hong Kong's continued participation, in an appropriate form, in international organizations. These arrangements were seen by both parties as an important element in the preservation of Hong Kong's own way of life, including the maintenance of the capitalist economic system. In exercise thereof, an extensive campaign of 'localizing' Hong Kong's treaty relations (for example, in the fields of trade and air services) was pursued in the period preceding the handover.[72]

Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) 1996 ICJ Reports 595, 2003 ICJ Reports 7, later *sub nom. Bosnia and Herzegovina v. Serbia and Montenegro*, <http://www.icj-cij.org/docket/files/91/13685.pdf>.

71 For a full account see D Papenfuss, 'The fate of the international treaties of the GDR within the framework of German unification' (1998) 92 *AJIL* 469, who points out that the GDR had pursued a hyper-active policy of treaty making as a device for seeking recognition.

72 See further the Treaties and International Agreements website of the Hong Kong Department of Justice: <http://www.legislation.gov.hk/choice.htm>.

Book X

ENVOI

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ADVICE TO DIPLOMATS

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40.1 Of the qualities necessary for the profession of a diplomat, Callières treats in his famous work *De la manière de négocier avec les souverains,*[1] and his observations, though made nearly three hundred years ago, have still a good deal to commend them. A brief summary of their main points is given below. In modern days methods of diplomacy are certainly less subtle and tortuous than were those of the past; while the rapidity of communication now enables a negotiator to remain in constant touch with his government throughout. But national character and human nature have not changed to any appreciable extent. Callières' counsels are summarized as hints that may prove useful to younger diplomats and as a suitable introduction to the present chapter.

40.2 A good negotiator should have enough self control not to speak without having asked himself what he has to say. He shouldn't fall into the error of a famous ambassador of our times who was so intemperate in debate that he revealed secrets in order to support his arguments.

He shouldn't err in the other direction by making a secret out of nothing and by being incapable of distinguishing between matters of importance and trifles.

One calls an ambassador an honourable spy as he tries to discover the secrets of the Court where he is accredited and he should spend what is necessary to pay those who can tell him.

A good negotiator should never base a successful negotiation on false promises or bad faith. Craftiness is an illustration of smallness of mind and an indication that the

[1] Eds H M A Keens-Soper and Karl W Schweizer (University of America Press, 1993).

person hasn't enough intellectual breadth to achieve his aims by fair and reasonable means.

A man who displays self-possession and calmness under pressure has a great advantage in negotiation over a man who is lively and fiery. To succeed in this profession, you need to speak much less than to listen: you need phlegm, reserve, plenty of discretion and patience.

A wise and capable negotiator needs to adjust himself to the habits and customs of the country where he lives without showing repugnance or contempt for them. He shouldn't publicly criticise the form of government he finds [Ed. unless that is a clear instruction from his own government]; indeed he should praise what is good about the country's form of government as no country's governance has a monopoly of good points.

He should know or learn the history of the country where he is resident and so recount the great deeds of the ancestors of the country's leaders or indeed their own deeds which will incline them to look kindly on the negotiator.

It's more of an advantage for a negotiator to carry out his business orally. This way he has more opportunity to discover the feelings and aims of his interlocutors and to put over his own arguments more forcefully.

One of the greatest secrets of negotiating is knowing how to distil drop by drop into the mind of interlocutors the matter of which one wants to persuade them [Ed. so that the interlocutor himself comes to a different view].

There is hardly anyone who wants to admit to being wrong or having made a mistake or who will give up his opinions in favour of yours if all you ever do is contradict him, however good your reasons. There are however many who will give up some of their opinions where you can find arguments which flatter their amour propre and advance their own interests thus justifying their change of view . . . one should avoid bitter and obstinate discussions with Princes and their ministers but reason with them without passion and without always wanting to have the last word.

40.3 A century later the first Earl of Malmesbury[2] wrote to Lord Camden, at the latter's request, on his nephew, Mr James, being destined for the foreign service:

Park Place, April 11, 1813.

My Dear Lord,

It is not an easy matter in times like these, to write anything on the subject of a Foreign Minister's conduct that might not be rendered inapplicable to the purpose by daily events.[3] Mr. James' best school will be the advantage he will derive from the abilities of his Principal, and from his own observations.

[2] James Harris, first Earl of Malmesbury, British ambassador at St Petersburg, 1777–82.

[3] At the beginning of the nineteenth century reference to a foreign minister was usually to a diplomat not a political figure.

The first and best advice I can give a young man on entering this career, is *to listen, not to talk*—at least, not more than is necessary to induce others to talk. I have in the course of my life, by endeavouring to follow this method, drawn from my opponents much information, and concealed from them my own views, much more than by the employment of spies or money.

To be very cautious in *any* country, or at *any* court, of such as, on your first arrival, appear the most eager to make your acquaintance and communicate their ideas to you. I have ever found their professions insincere, and their intelligence false. They have been the first I have wished to shake off, whenever I have been so imprudent as to give them credit for sincerity. They are either persons who are not considered or respected in their own country, or are put about you to entrap and circumvent you as newly arrived.

We should be most particularly on their guard against such men, for we have none such on our side of the water, and are ourselves so little *coming* towards foreigners, that we are astonished and gratified when we find a different treatment from that which strangers experience here; but our reserve and *ill manners* are infinitely less dangerous to the stranger than these premature and hollow civilities.

To avoid what is termed abroad an *attachement.* If the other party concerned should happen to be sincere, it absorbs too much time, occupies too much your thoughts; if insincere, it leaves you at the mercy of a profligate and probably interested character.

Never to attempt to export our own habits and manners, but to conform as far as possible to those of the country where you reside—to do this even in the most trivial things—to learn to speak their language, and never to sneer at what may strike you as singular and absurd. Nothing goes to conciliate so much, or to amalgamate you more cordially with its inhabitants, as this very easy sacrifice of *your* national prejudices to *theirs.*

To keep your cypher and all your official papers under a very secure lock and key; but not to *boast* of your precautions, as Mr Drake did to Mehée de la Touche.

Not to allow any opponent to carry away any official document, under the pretext that he wishes 'to study it more carefully;' let him read it as often as he wishes, and, if it is necessary, allow him to take minutes of it, but *both in your presence.*

Not to be carried away by any real or supposed distinctions from the sovereign at whose Court you reside, or to imagine, because he may say a few more commonplace sentences to you than to your colleagues, that he entertains a special personal predilection for you, or is more disposed to favour the views and interests of your Court than if he did not notice you at all. This is a species of royal stage-trick, often practised, and for which it is right to be prepared.

Whenever you receive *discretionary* instructions (this is, when authority is given you) in order to obtain any very desirable end, to decrease your demands or increase your concessions according as you find the temper and disposition of the Court where you are employed and to be extremely careful not to let it be supposed that you have any such authority; to make a firm, resolute stand on the first offer you are instructed to make, and, if you find *'this nail will not drive,'* to bring forward your

> others *most gradually,* and not, either from an apprehension of not succeeding at all, or from an over-eagerness to succeed too rapidly, injure essentially the interests of your Court.
>
> It is scarcely necessary to say that no occasion, no provocation, no anxiety to rebut an unjust accusation, no idea, however tempting, of promoting the object you have in view, can *need,* much less justify, a *falsehood.* Success obtained by one is a precarious and baseless success. Detection would ruin, not only your own reputation for ever, but deeply wound the honour of your Court. If, as frequently happens, an indiscreet question, which seems to require a distinct answer, is put to you abruptly by an artful minister, parry it either by treating it as an indiscreet question, or get rid of it by a grave and serious look: but on no account contradict the assertion flatly if it be true, or admit it as true, if false and of a dangerous tendency.
>
> In ministerial conferences, to exert every effort of *memory* to carry away faithfully and correctly what *you hear* (what *you say* in them yourself you will not forget); and, in drawing your report, to be most careful it should be faithful and correct. I dwell the more on this (seemingly a useless hint) because it is a most seducing temptation, and one to which we often give way almost unconsciously, in order to give a better turn to a phrase, or to enhance our skill in negotiation; but we must remember we mislead and deceive our Government by it.
>
> I am, etc.[4]

40.4 A good diplomat will always try to put himself in the position of the person with whom he is negotiating, to understand his objectives and needs, and try to imagine what he would wish, do, and say, under those circumstances. The man who speaks a foreign language, not his own, is to a certain extent wearing a disguise. If one wants to discover his core ideas, encourage him to use his own language. The surest way to understand a country is to get to know its language and thereby to understand the feelings of the people.

40.5 A diplomat should always take care to protect the dignity of the State which he represents. However, it is not always easy to avoid making mistakes in precedence and protocol generally in a foreign country. A diplomat who considers himself the victim of such a mistake and attempts to make a scene makes himself, more often than not, ridiculous, even if he tries to justify himself on the ground that it is his country's position that he is defending and not his own. Such mistakes are seldom made maliciously or deliberately. A sense of humour is often the best solution.

40.6 The head of mission should be careful that the affairs, the manners, and customs of the country in which he is residing are not criticized under his roof. What he or his guests may say on such subjects may well be repeated to his disadvantage.

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[4] *Diaries and Correspondence,* Vol 4, 420.

A native occasionally makes disparaging remarks about his own country. A diplomat should think at least twice before he expresses agreement with them.

40.7 A diplomat should not hold commercial real estate nor should he engage in trade or hold directorships, or speculate on the stock exchange in the territory of the State where he is accredited. He must not run the risk of his judgement as to the financial stability of the State or of local commercial undertakings being affected by his personal interest (see Chapter **9**, paragraphs **9**.19 and **9**.20). Diplomatic service regulations of some States (eg the US) prohibit investment by their own diplomats in companies or enterprises in countries where they are posted.

40.8 A diplomat must be on his guard against the notion that his own post is the centre of international politics, and against an exaggerated estimate of the part assigned to him in the general scheme. While ministers and senior officials at home have the responsibility to decide what should be the main direction of foreign policy, and to gauge the relative value of political friendships and alliances, they should appreciate well-argued and proportionate advice.

40.9 In earlier times an ambassador enjoyed a wide discretion in the interpretation of his instructions, in case it became necessary to take a sudden decision, but in these days, when communication is virtually instantaneous, if he thinks that his instructions are not perfectly formulated to secure the government's objectives, he can easily ask for them to be modified. In doing this he may want to explain his reasoning and suggest alternative wording.

40.10 Occasionally, a diplomat may wish to pass a copy of the instructions he receives to his host government. In doing so, however, he should take great care to ensure that there is nothing in the instructions which is best left uncommunicated in writing or indeed orally. On the other hand there will be occasions when it is advisable to leave a written copy of instructions so that no ambiguity can remain. The interview of the US ambassador with Saddam Hussein shortly before the Iraqi invasion of Kuwait in 1990 is a case in point. According to one school, Saddam Hussein would have inferred from his exchange with the Ambassador that an invasion of Kuwait by Iraq would be regarded as undesirable by the US but would certainly not be regarded as a *casus belli* by that government.[5] This was later contradicted by Tariq Aziz, who was present at the meeting as the

[5] According to an Iraqi transcript reprinted in the New York Times on 23 September 1990, Ambassador Glaspie said 'we have no opinion on the Arab-Arab conflicts, like your border disagreement with Kuwait. I was in the American Embassy in Kuwait during the late 60's. The instruction we had during this period was that we should express no opinion on this issue and that the issue is not associated with America. James Baker has directed our official spokesmen to emphasize this instruction. We hope you can solve this problem using any suitable methods via Klibi or via President Mubarak. All that we hope is that these issues are solved quickly.'

foreign minister, and who claimed that there were no mixed messages and that the Ambassador was there to receive a message from Saddam Hussein, not deliver one.[6] Whatever the truth of the matter, misunderstandings can prove fatal. In critical circumstances it is not the job of the diplomat to make his message more palatable to the recipient.

40.11 Although it is now unusual to send to a head of government or minister a draft report of a conversation for any observations, corrections, or comments before it is sent back to the home ministry, there will be times as in the case described above where such a course may be advisable.

40.12 In concluding any written agreement with the State to which he is accredited, the diplomat should take ample time to study the document carefully to ensure that its substance meets his instructions and avoids any ambiguity or inaccuracy in the terms used. Clear and definite language should in all cases be employed. The diplomat will not wish to finalize any written agreements without clearance of the text with his sending State. This will typically involve clearance with the foreign ministry's legal advisers, Treaties Division, and ministers. A written agreement—unless clearly not intended to create legal relations—is a treaty, requiring publication in parliament, registration with the UN etc.

40.13 Heads of missions and senior foreign ministry officials are generally too busy to assist in the training of junior diplomats, in particular perhaps in the proper methods of drafting correspondence, reports, etc. Ideally where they have too little time to act personally as instructors, they should make a point of delegating the task to some experienced member of their mission or department. But senior staff should aim to encourage junior colleagues, be tolerant of those learning the basics of the profession, and try to mentor by example. More often however responsibility for training is transferred to the ministry's central administration who will generally organize courses in such skills as drafting, negotiating with professional trainers, languages, consular practice, and international law.

[6] Frontline January 2000, Interview with Tariq Aziz. 'There were no mixed signals. We should not forget that the whole period before August 2 witnessed a negative American policy towards Iraq. So it would be quite foolish to think that, if we go to Kuwait, then America would like that. . . . So how could we imagine that such a step was going to be appreciated by the Americans? About the meeting with April Glaspie—it was a routine meeting. There was nothing extraordinary in it. She did not ask for an audience with the president. She was summoned by the president. He telephoned me and said, "Bring the American ambassador. I want to see her." . . . So, what she said were routine, classical comments on what the president was asking her to convey to President Bush. He wanted her to carry a message to George Bush——not to receive a message through her from Washington.'

40.14 The duties of the head of a mission and consuls in particular include also the giving of advice to their own country's citizens when in difficulties and especially intervention on their behalf when they are arrested and detained in custody. Diplomats and consuls should not, however, interfere in civil actions that may be brought against them, or in criminal matters except where proper legal procedures have not been followed. Nor must they on any account occupy themselves with the interests of citizens of their host country.[7]

40.15 A diplomat should not publish without the authority of his immediate superiors any writing embodying his personal views on international politics, either anonymously or with his name. Most diplomatic services have internal regulations covering this.

40.16 The reader who has reached this point in the chapter will reflect that the art of negotiation is not new and that wisdom from the past is every bit as valid today as it was in the times of Callières and Malmesbury. The twenty-first-century psychologist may analyse what the skilled practitioner has always known instinctively. Negotiation is a dialogue made up of give and take, and the diplomat will be a poor performer who, as Callières says, is so full of his own ideas that he can only think about getting himself listened to, and can scarcely bring himself to listen in his turn. It is noteworthy that this insistence on the virtue of listening is common to both Callières and Malmesbury. Perhaps the advice of the latter to a young man 'to listen, not to talk'—at least not more than is necessary to induce others to talk—is a shade cynical, or at least too sweeping. Sometimes you have a long or complex message to deliver which may need clarifying. Sometimes, maybe, the other interlocutor has a legitimate wish to listen himself. Everyone knows the colleague who asks everything and gives nothing; and Callières warned against this too. Malmesbury has a good point for beginners; but Callières, aware of the strength of suggestion, recommends learning the secret of distilling 'drop by drop' into the mind of the listener the substance of which one wishes to persuade him.[8] And it may happen that the advice to listen becomes more rather than less important with experience; for the more one has to say, the greater the temptation to say it, whether it is timely or not.

The Nicolson Definition

40.17 Before advice is offered on situations arising from latter-day changes in the method and content of diplomacy—situations which Satow would certainly

[7] See Chapter **20.**
[8] Paragraph **40**.2 above.

have dealt with—one more classic statement must be added on what a diplomat ought to be, say, and do. It may suitably be called 'the Nicolson test':

> These, then, are the qualities of my ideal diplomatist. Truth, accuracy, calm, patience, good temper, modesty, loyalty. They are also the qualities of an ideal diplomacy.
>
> 'But,' the reader may object, 'you have forgotten intelligence, knowledge, discernment, prudence, hospitality, charm, industry, courage and even tact.' I have not forgotten them. I have taken them for granted.[9]

40.18 One should pause a moment over 'truth'. When a Soviet foreign minister told the president of the United States in 1962 that there were no Soviet missile launchers in Cuba, President Kennedy happened to have in his desk drawer a photograph of just such weapons. What could be his judgement? Perhaps that of Aristotle who, it is said, when asked what a person could gain by uttering a falsehood, replied, 'Not to be credited when he shall speak the truth'. The incident did not change the power position in the world. It merely cast doubt over future judgements made not at the diplomatic but at the highest political level.

40.19 The same comment could be applied to relations with the former Iraqi leader Saddam Hussein whose lies and deception both over his plans to invade Kuwait and his weapons programme meant that when he claimed in 2002 that he had no weapons of mass destruction (WMD), there was widespread scepticism. This scepticism led directly to the invasion of Iraq in 2003. Similarly Bismarck earned a dubious reputation when it became known that, by sending in 1870 the famous Ems telegram,[10] a message deliberately economical with the truth, he had made

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9 H Nicolson, *Diplomacy* (Oxford, 1939) 126.

10 'The Ems telegram was a report of an encounter between King William I of Prussia and the French ambassador; the telegram was sent from Ems (Bad Ems) in the Prussian Rhineland on July 13, 1870, to the Prussian chancellor, Otto von Bismarck. Its publication in a version edited by Bismarck so as to purposely offend the French government precipitated the Franco-German War. Early in July, the candidacy of Prince Leopold of Hohenzollern-Sigmaringen, a relative of the Prussian king, for the Spanish throne had alarmed the French, who feared that the extension of Prussian influence into Spain would threaten France. Leopold's candidacy was withdrawn on July 12; the following day, the French ambassador to Prussia, Count Vincent Benedetti, approached King William at Ems to request an assurance that no member of his family would again be a candidate for the Spanish throne. The king politely refused Benedetti's demand, and their discussion ended. A telegram describing the incident was sent to Bismarck. Bismarck's edited version, which he published the next day, omitted the courtesies in the two men's exchange and instead made it seem that each man had insulted the other. This touched off an intensified demand for war in Paris and Berlin, and France declared war on July 19. The incident provided the excuse for a trial of strength that was sought by both France and Prussia, but because of Bismarck's dishonest editing of the Ems telegram, it was France that was the first to declare war. This circumstance helped enlist the southern German states to Prussia's side in the ensuing war, which resulted in the unification of all the German states (except Austria) into modern Germany.'

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sure that war between Prussia and France, a war he sought as the means to unify Germany, could not be prevented As Bismarck himself put it, 'The Ems Telegram should have the desired effect of waving a red cape in front of the face of the Gallic Bull'.[11]

Multilateral Diplomacy

40.20 For the practitioner of multilateral diplomacy, particular skills are involved. Unlike the classic bilateral diplomat, the individual representing his country in a multilateral organization will spend much of his time with diplomats from other States. Essential background is to know the rules, provisions of a charter or treaty which govern the organization, as well as much of the *acquis* of previous decisions. Familiarity with the rules of procedure which determine the conduct of meetings is also invaluable. Getting to know colleagues and where possible establishing a relationship of trust is also important. Obviously some key members are priorities, but it is best to have the widest range of relationships. No one likes being acknowledged only when a favour is being sought. These links are vital when it comes to identifying the bases for eventual agreement and securing coalitions to get the necessary votes. Understanding the position and interests of others is essential. It is also wise to seek the advice of permanent officials of the organization.

40.21 In meetings, individuals represent their State and are assumed to be setting out formally the position of that State on the issue or proposal under discussion. It is therefore important to have clear instructions from the capital and agreement on how much flexibility the representative is to enjoy. As necessary, communication with the capital on developments in negotiations permit instructions to be updated or revised. Instructions can, of course, be interpreted in different ways. Positive constructive approaches always encourage a good atmosphere and help foster agreements. Perversely positive instructions deliberately presented in a negative manner can have the opposite effect.

40.22 On the basis of instructions, knowledge of the issue, and appreciation of the views of others, the representative will set out a position. This should be done clearly, without polemics and remembering that jokes seldom travel well. It is useful to indicate in the introduction the points to be made, then to set out those points in some detail, and in conclusion summarize succinctly the arguments made. In this way note-takers will catch the points. It is often a tactical decision

[11] A J P Taylor, *Bismarck, The Man and the Statesman* (New York: Vintage Books. 1967) 121.

when to speak in a debate, and if there are interpreters involved, they appreciate having a written text where it exists, or a speed of oral delivery which permits a good interpretation. The role of the chair is important, as are relations with the chair. Understanding in advance what the chair expects to achieve and the intended conduct of business is vital to deciding how and when to intervene in discussion. If a written text is being discussed it is always an advantage to have influenced the content of the draft. In discussion, as necessary, clear amendments, often discussed in advance with colleagues, are tabled to help secure outcomes compatible with instructions. It is best to avoid ambiguous language, particularly in legally binding texts—the only exception perhaps being when limited constructive ambiguity may be the price of securing an agreement.[12]

40.23 Negotiations can take place in a quiet formal way or at the other extreme in a heated emotional atmosphere. At all times, the negotiator will do well to remember his instructions and the objectives which have been set. It does not pay to get carried away by the search for agreement and the satisfaction of producing acceptable texts to overcome objections, if the result does not achieve what is required. It is also salutary to remember that when the chair asks if there is agreement, that is the moment of maximum attention and the occasion to object if the representative believes the text to be in some way unacceptable to his government. It is too late to say no after the chair has pronounced agreement without any objection. After agreement, or indeed lack of agreement, there is often press interest. It is always a good idea to have two or three points ready to brief the press, whatever the outcome, after the meeting.

Problems of Protocol and Precedence

40.24 A sure way of making oneself look foolish is to 'make a scene' about matters of precedence and protocol. In 1508 Dr de Puebla, the Spanish ambassador in London (and incidentally the first resident ambassador there) informed his successor that 'it was his custom to attend court ceremonies when he was invited and to sit or stand wherever he was placed, since his business was to maintain friendship between his master and the King of England and he thought it would be ill served by making a fuss over trifles'.[13]

40.25 It should always be remembered that protocol is a means to an end and not an end in itself. As Sir William Temple, British ambassador to the Viceregal Court at

[12] See E Denza, 'Compromise and Clarity in International Drafting' in C Stefanou and H Xanthaki (eds), *Legislative Drafting: a Modern Approach* (Aldershot: Ashgate, 2008).

[13] G Mattingly, *Renaissance Diplomacy* (London, 1955) ch 25.

Brussels, put it, 'ceremonies were made to facilitate business, not to hinder it'.[14] If protocol goes beyond this, then the proper sense of proportion has been lost, and that frequent phrase, '[I]t is not for me, it is for my country' has lost its integrity.

40.26 In the more informal diplomatic society of the twenty-first century, younger diplomats may feel an impatience with protocol and ask whether it is really necessary. Put generally, if no rules governed diplomatic and other official occasions, the problem of seating would be solved by a free-for-all with unfair results. In this respect diplomats would behave neither better nor worse than other human beings. Obviously in public life some people are more powerful or more interesting than others, and a seat next to one (or two) of them is both a privilege and an advantage. If there were no rules there would be pushing and shoving, and unscrupulous characters would, with whatever pretence of politeness, place themselves more effectively than others with a more developed sense of courtesy. Much bad blood would be created and the host government would rightly be criticized for letting it happen. At least, if the rules are followed, there is no discord. The wisdom of the Congress of Vienna in assigning precedence according to date of arrival in post is not to be sneered at.

40.27 An important contribution a diplomat can make to this procedural harmony is not to take any risk of causing a scene when he himself is the host at some diplomatic occasion. He should never be content to trust to instinct or to an ostensibly knowing colleague's advice. If he has the slightest doubt about *placement* he should consult the host government's head of protocol. It is that official's duty to know and to advise; if he does not know, the person who has put a difficult problem to him has rendered him a service. The problem may recur.

40.28 Protocol in the shape of *placement* should not, however, be rigid. Let us suppose that, as can quite possibly happen, the balance of acceptances and refusals for a sit-down luncheon leaves the host in a situation where all the diplomatic guests outrank all the guests from the host country. To seat them accordingly might well defeat the whole purpose of the party. It is possible to adjust the *placement* to suit common sense, by mixing diplomatic and host country guests but it is probably wise to make sure that all the guests who will be 'demoted' according to protocol have been informed in advance.[15] It is now regarded as

[14] Sir William Temple (1628–99), distinguished British diplomat and writer much involved in the succession of William III and Mary to the British throne in 1689. In 1669 he applied the principle quoted above in the brilliantly swift negotiation of an alliance to protect the Netherlands and Flanders against French pressure.

[15] This suggestion is made on no other authority than experience, which may not be applicable everywhere.

perfectly acceptable to vary protocol requirements to ensure that all guests are seated next to one person at least they can speak to in a language with which they are comfortable. The welcome and good humour of the host, together with explanations in advance as to what is intended, can help prevent any misunderstandings. It is also essential to take account of gender balance and be sensitive to the position of partners accompanying diplomatic officers, many of whom are pursuing their own careers and interests.

Public Occasions

40.29 The real difficulty occurs when on a public occasion, or an occasion which will be known about publicly, a mistake is made by the host government or by, say, a diplomatic colleague, which could legitimately be thought to cause embarrassment or give rise to misunderstanding. The situation is particularly difficult to handle when, as can well be the case, the person whose position is adversely affected has only a few seconds in which to make up his mind whether to protest at once or to let the matter pass. In the latter case he can protest later to the host government, but this is obviously much less telling than to make his objection known at once. At the funeral of Pope John Paul II in 2005, Prince Charles was placed in an embarrassing position by being placed, by the Vatican, one seat away from President Mugabe of Zimbabwe and being surprised into shaking hands with him when relations between the United Kingdom and the Mugabe regime had reached rock bottom.

40.30 Strange events such as these are the oddities affecting contemporary diplomacy, especially in countries and regions where secrecy combined with strict political orthodoxy is regarded as a prerequisite of good government. In such situations it is advisable to form the habit of scanning the seating order at a public function as a clue for a correct judgement of the balance of power within the government. Furthermore, remembering that on public occasions in such countries every detail of speech and conduct may be planned and observed with an eye to its potential utilization in propaganda, a diplomat will be wise to refrain from applauding an official speech unless he understands it, even though his applause might be intended merely as a courtesy to the host government. But all these counsels to circumspection lead back to a reminder of the elementary principle that the diplomat arriving at a new post must try to develop a feel for the way in which the host country manages its external policy.

40.31 If you are in the United States, you will be conscious of the important and active role played by the Congress, and particularly by the Senate Foreign Relations Committee, in the supervision of policy and the appointment of ambassadors.

This perspective is reflected in those Latin American countries which maintain democratic government on the United States model. In Britain and other Commonwealth countries, where the power of the executive is more direct, there is sometimes a temptation to impatience with what seem (wrongly) to be deliberate American procrastinations. Attempts by the House of Commons Foreign Affairs Committee to hold the executive more to account on the US model (with so far limited effect) may moderate this impatience.

40.32 In countries with political organizations of the French type, a diplomat will find that he has to learn to understand and work with the so-called *cabinet* system.[16] The minister, as in all governments, derives information and support from his department. But he has also a personal supporting team of his own choice, consisting partly of officials and partly of people from political, academic, and professional life who, while conversant with external policy, are his personal eyes and ears in relation to what the rest of the government is thinking and doing. This arrangement, among other things, helps to protect his external policy against erosion from outside his own department.

40.33 Since the institutions of the European Union are based very largely on a Latin rather than an Anglo-Saxon tradition, it is natural that a *cabinet* system should prevail there; and the diplomat in Brussels, whether representing a Member State or a non-member, will need to develop relations with the *cabinet* as well as the department of any Commissioners with whom contact is needed.

Internal Discords

40.34 Diplomacy, like any other worldwide activity, enjoys and suffers its own peculiar rewards and deprivations: against absorbing interest must be set the disadvantages of family separation; against exciting variety, periods of unexpected monotony. Diplomacy also has privileges, as described in previous chapters, linked with special obligation and responsibility. Within this general framework are the aspects of personal relationships which can, at least over short periods, make or mar the good functioning of the machine as a whole. One of these, while common enough in other walks of life, has particular dangers in diplomacy. It has been called the Us and Them complex; and it can still arise even in an age when instant communication whether by telephone or other means links the post abroad with the ministry at home.

[16] In this context, the word 'cabinet' is always used with the French pronunciation.

40.35 Honest differences of view between different diplomatic missions serving the same government, or between a mission and the home department, are unavoidable and indeed essential to proper analysis of future policy. But there is a dangerous by-product if such disagreement corrodes into destructive habit. It is only too easy to build up in a mission abroad a picture of Us as hardworking, conscientious, and prompt, battling with a disobliging foreign government and a disagreeable climate, while They are living comfortably at home, taking their bureaucratic time over correspondence and callous about Our physical afflictions. Or, in reverse. We are commuting uncomfortably, cramped bureaucratically, and (to Our way of thinking) financially disadvantaged; why is this not apparent to Them?

40.36 None of this is wholly unreasonable; its only fault is that, if it is allowed to grow, it is fatal, first to personal relationships between post and ministry, and later to the conduct of the diplomatic machine. The main responsibility for avoiding this development of the Us and Them disease lies with the head of the post or the head of the department. But no one should be unconscious of the possible danger, or too lazy, or too timid, to do something about it when its symptoms appear. The search for the right way is one of the challenges to diplomats and to a diplomatic service. Neither total complacency nor total officiousness is helpful, and tattle is apt to be worse still.[17]

40.37 Most advice to diplomats falls under the heading 'organized common sense'. But among the traps that can be difficult to detect without advice is the following. An abnormally heavy responsibility may suddenly be imposed on a young diplomat when an unexpected crisis occurs in the absence of the head of mission or leader of delegation. The young diplomat performs brilliantly, possibly in a way that attracts public attention. It is subconsciously tempting at such a moment to promote oneself to a rank beyond that which one's limited service will carry. It is wiser to remind oneself that experience is the best ally of true talent. But it is also incumbent upon the more senior colleagues to recognize good performance.

40.38 But enough of precept. Shakespeare must have, as so often, the last word. No one is quite sure whether Polonius's advice to Laertes is to be taken as parody, irony, or high seriousness. But to say to a diplomat:

> . . . to thine own self be true,
>
> And it must follow, as the night the day,
>
> Thou canst not then be false to any man[18]

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17 For some comment on certain concrete cases, see P Gore-Booth, *With Great Truth and Respect* (London, 1974) 80–1.

18 *Hamlet,* Act I, Scene 3, 1. 78.

is to get as near to the kernel of truth as this Guide can travel. And if the diplomat, aspiring or experienced, who has read thus far should feel bloated with instructions and exhortations, let consolation be found in Warwick's exclamation:

> Alas! How should you govern any kingdom
>
> That know not how to use ambassadors?[19]

[19] *King Henry VI, Part III,* Act IV, Scene 3, l. 35.

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APPENDIX I

The Language of Diplomacy

The following selective elucidations of certain terms and expressions are meant to be illustrative (and interesting) rather than exhaustive:

Acta jure imperii, acta jure gestionis. Terms used particularly in connection with the exercise of jurisdiction by a national court over a foreign State or its officials to distinguish acts in the exercise of sovereign or governmental authority and acts performed of a commercial or private law nature.

Ad referendum. When the head of state whom an ambassador represents, or to whom he is accredited, dies, the mission of the ambassador is, strictly speaking, at an end. During the interval which must elapse before he can receive fresh credentials, it used to be said that he may carry on a negotiation which has already been commenced, *sub spe rati,* ie in the expectation that what he promises will be ratified by his head of state. But in these days of instant communication between capitals even the most distant from each other, a prudent diplomat will not commit his government by a provisional acceptance of what is not supported by his previous instructions. The most he will do will be to receive the proposal *ad referendum.* This term is in regular use for provisional acceptance by a negotiator on the understanding that he proposes immediately to seek specific instructions.

Casus belli and *Casus foederis.* These terms appear to be sometimes confused.

The former signifies an act or proceeding of a provocative nature on the part of one Power which, in the opinion of the offended Power, justifies it in making or declaring war. Palmerston defined it in 1853 as 'a case which would justify war'.[1] The latter is an offensive act or offensive behaviour of one State towards another, or any occurrence which gives the latter a reason to invoke a treaty with an ally and to require the ally to fulfil the undertakings of the alliance existing between them. With the demise, however, of the formal declaration of war and state of war under the legal regime of the UN Charter, both terms have fallen out of use.

Customs union. An agreement made by two or more countries to impose a common tariff on goods imported by them from non-member countries.

Démarche. Any diplomatic representations or protests usually delivered in person and supported by written material in the shape of an aide-mémoire, a letter or a 'non-paper' which provides a written version of the verbal presentation or 'talking points'. (See also Chapter **4**, paragraph **4.**19.)

Détente. A relaxation of tension in the relations between countries, not necessarily implying *rapprochement* on matters of political or ideological conviction, or a reduction in the means of defence. (See also Chapter **1**, paragraph **1.**19 and n 26.)

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[1] Ollivier, *L'Empire Libéral,* Vol 2, 363.

Domino theory. The contention that in specific circumstances the collapse of a government or State will cause the collapse of a neighbouring government or State, which in turn will produce a series of similar collapses, on the analogy of falling dominoes.

Donner la main (in English give the hand, German *Oberhand*) means to give the seat of honour, ie on the right hand of the host or diplomatic agent receiving a visit from a person of lower rank. The Elector Max Joseph of Bavaria was reported in 1765 to have bestowed this mark of deference on the Imperial Ambassador 'which certainly no crowned head in Europe would do'.[2] In the instructions to Lord Gower, on his appointment as ambassador to Paris in 1790, he is directed to act in accordance with the Order in Council of 26 August 1668, and 'to take the hand of envoys' in his own house, ie to place them on his left hand.[3]

En clair. Used of a message sent uncoded: literally in plain language.

Executive agreement. An international agreement made by executive officers of the State without reference to the legislature (eg in the United States an agreement not requiring the assent of the Senate).

Explanation of Vote (EOV). After a vote in the UN General Assembly or Security Council, it is common that certain members will want to make a short speech explaining why their government has voted in a particular way. The same practice operates in other international bodies and at international conferences.

Flag of convenience. The flag of a State whose laws are less onerous on shipowners than those of other States. They are for this reason controversial. Vessels registered in such a State fly its flag and their crews are subject to its laws.

Force majeure. Compulsion or coercion by circumstances which one cannot control.

Free trade area. Two or more countries agreeing to the abolition of tariffs on goods imported from each other, but not necessarily to the imposition of a common tariff on imports from outside the area.

Placement. The placing round a table of guests at a formal meal, or of officials at a meeting, by reference usually to rank and seniority. (See Chapter **14**, paragraphs **14.**2 and **40.**24–**40**.28.)

Prendre Acte. Donner Acte. The legal definition of *acte* is 'a declaration made before a court, whether spontaneously or in consequence of an order of a court, and which has been certified to have been made'. In diplomacy it is applied to any document recording an international agreement by which an obligation is undertaken; such as, for instance, the convention for the suspension of hostilities of 23 April 1814, signed between France and the four allied Great Powers.[4] 'Instrument' is the proper English equivalent, though we sometimes find it rendered by 'Act'.

Prendre acte is to declare that one will avail oneself, should the necessity arise, of a declaration or admission made by the other party, without conceding that one is in any way bound by that declaration. 'To take note of' is perhaps the English equivalent. Yet it may sometimes conveniently be rendered by 'recognise' or 'acknowledge'.

> Mais les sagesses tardives ne suffisent point; et même quand elles veulent être prudentes, l'esprit politique manque aux nations qui ne sont pas exercées à faire elles-mêmes leurs

[2] Browning, *The Despatches of Earl Gower,* 2.
[3] See also *Annual Digest, etc.* (1927–8), Case No 24.
[4] Guizot, *Mémoires, etc,* Vol 1, 95.

> affaires et leur destinée. Dans le déplorable état où l'entreprise d'un égoïsme héroique et chimérique avait jeté la France, il n'y avait évidemment qu'une conduite à tenir; reconnaître Louis XVIII, prendre acte de ses dispositions libérales et se concerter avec lui pour traiter avec les étrangers.[5]

Donner acte is to give recognition to another party that he has performed a certain necessary act.

Raison d'état or Realpolitik. The interest of the State taking precedence over normally accepted morality.

Sine qua non denotes a condition that must be accepted, if an agreement is desired by the party to whom it is proposed.

Special Representative. In United States' usage someone appointed or assigned by the President to a particular function or task (usually on a non-residential basis) without confirmation by the Senate. Also used increasingly by the UN Secretary-General (where it can often be residential) and by other governments and regional organizations. The EU Special Representative for Bosnia and Herzegovina is also High Representative for the same country, a pro-consular position created after the Dayton Peace Agreement in 1995 and based in Sarajevo.

Ultimatum. This term signifies a note or memorandum in which a government or its diplomatic representative sets forth the conditions on which the State in whose name the declaration is made will insist. It should contain an express demand for a prompt, clear, and categorical reply, and it may also require the answer to be given within a fixed limit of time. This is as much as to say that an *ultimatum* embodies the final condition or concession, 'the last word,' so to speak, of the person negotiating.[6] It ordinarily, but not always, implies a threat to use force, if the demand is not complied with.

Article I of The Hague Convention No 3 of 1907 declares that:

> Les Puissances contractantes reconnaissent que les hostilités entre elles ne doivent pas commencer sans un avertissement préalable et non équivoque, qui aura, soit la forme d'une déclaration de guerre motivée, soit celle d'un ultimatum avec déclaration de guerre conditionnelle.

Some of the most graphic instances of *ultimata* are to be found in the period leading to the outbreaks of the two world wars. Four weeks after the assassination of Archduke Franz Ferdinand in Sarajevo, Austria-Hungary presented an *ultimatum* to Serbia. This took the form of a Note, dated 23 July 1914, to the Serbian government, containing various demands, and requiring an answer by six o'clock in the evening of the 25th. The reply of the Serbian government not being regarded as satisfactory, the Austro-Hungarian Minister left Belgrade, and war was declared against Serbia on the 28th.

The German *ultimatum* to Belgium of 2 August 1914, demanded permission to march through Belgian territory and threatened to regard Belgium as an enemy 'should Belgium react with hostility to German troops, should she, in particular, create difficulties to their advance through resistance at the fortresses at the Meuse or through the destruction of railways, roads, tunnels or other technical constructions'. The note of the German minister presenting this demand did not mention any length of time for an answer, but it appears he had verbally required an answer within 12 hours.

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[5] Temperley, *Frederick the Great and Kaiser Joseph,* 67.
[6] Cussy, *Dictionnaire du Diplomate et du Consul,* s.v.; Oppenheim, Vol 2, s 95.

On 4 August the British government protested against a violation of the treaty by which Belgium was constituted a neutralized State, and requested an assurance that her neutrality would be respected by Germany. Later in the day a telegram was sent to Berlin, instructing the Ambassador to ask for the same assurance to respect the neutrality of Belgium as had been given by France, and for a satisfactory reply to be received in London by midnight. These requests, especially the last, amounted in substance to an *ultimatum.*

On 3 September 1939 the British government instructed their ambassador in Berlin to deliver an *ultimatum* to the German foreign minister demanding confirmation that Germany had suspended all aggressive action against Poland and were prepared promptly to withdraw their forces from Polish territory, and that, failing receipt of such confirmation by 1100 British Summer Time, a state of war would exist between the two countries. (See Chapter **4**, paragraph **4.9**.)

The Nazi government in the Second World War more than once waited to present its *ultimata* until German troops had actually crossed the frontiers of the victim countries. Such action contrary to all the norms of diplomatic practice was, of course, a cynical if transparent ploy ostensibly to comply with diplomatic practice while in reality making a mockery of it.

More recent examples of what were effectively *ultimata* came in the form of the UN Security Council resolution 678 (1990) which authorized the use of force ('to use all necessary means' in the language of the UN) to secure the withdrawal of Iraq after its invasion of Kuwait in August of that year. The relevant paragraphs with the *ultimatum* language italicized are as follows:

1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, *to allow Iraq one final opportunity, as a pause of goodwill*, to do so;
2. Authorizes Member States cooperating with the government of Kuwait, *unless Iraq on or before 15 January 1991 fully implements*, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area . . .

And NATO repeatedly threatened Yugoslavia with air strikes in early 1999 to compel compliance with Western demands viz withdrawal of its military and security forces from the province of Kosovo and signature of a peace agreement negotiated at a conference in Rambouillet in February and March of that year. After the failure of the Rambouillet conference, US Assistant Secretary of State, Richard Holbrooke, travelled to Belgrade to deliver a final ultimatum to President Milošević on 22 March 1999 but without success. The bombing of Yugoslavia began two days later.

The meaning of *ultimatum* is not restricted to the sense which it bears in the above examples. During the course of a negotiation it may imply the *maximum* amount of concession which will be made in order to arrive at an agreement, where no resort to compulsion is contemplated in case of refusal. Cases have occurred in which it has been used as denoting an irreducible minimum which would be accepted, a plan or scheme of arrangement which it was sought to impose, a maximum of what would be conceded, and the like.

Uti possidetis and *status quo.* These two phrases often amount to the same thing, and are used to denote actual possession by right of conquest, occupation, or otherwise, at some particular moment, which has to be defined with as much exactness as possible in the proposals for a

treaty of peace, or in the treaty itself.[7] But while *uti possidetis* relates to the possession of territory, the *status quo* may be the previously existing situation in regard to other matters, eg to privileges enjoyed by one of the parties at the expense of the other, such as the French privilege of taking and drying fish on a portion of the coast of Newfoundland. *Uti possidetis juris* is now recognized as a principle beyond the purely colonial context which secures respect for existing territorial boundaries at the time when independence is achieved unless the States concerned agree otherwise.

[7] Foster, *A Century of American Diplomacy,* 246, defines *uti possidetis* by the belligerents as the territory occupied by their armies at the end of the war, but this seems too absolute. Cf Oppenheim, Vol 2, § 263.

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APPENDIX II

Conferences

(See Chapter **34**)

Paris Peace Conference, 1946

1. Peace Treaties with Italy, Romania, Bulgaria, Hungary, and Finland.

In the conditions that obtained after the cessation of hostilities in Europe, it became evident that the conclusion of any Peace Treaty by the ordinary process of calling a full-scale Peace Conference, to be attended by all the Allied countries, with such representation of the enemy countries as might be decided on, was likely to prove unduly difficult and long drawn out, and that it would be necessary to adopt some procedure directed to 'predigesting' the material to go into the proposed Peace Treaty before this actually got to a Peace Conference. It was accordingly decided to make use of the machinery of the Council of Foreign Ministers established by the Potsdam Conference in 1945 (the Council consisting for this purpose of the foreign ministers of France, the Soviet Union, the United Kingdom, and the United States). The Council of Foreign Ministers, so composed, accordingly met in Paris at the Palais du Luxembourg in April 1946. Each foreign minister was attended by a deputy, and the process was for the deputies to meet in the mornings and the foreign ministers in the afternoons. There were various Committees of Experts: military, economic and legal, etc. There was a double process by which questions were considered in these Committees and then passed up through the deputies to the foreign ministers; or, alternatively, by which questions were first considered by the foreign ministers or the deputies and then passed down, to come up again later. The deputies acted as the central clearing house of the process. Anything which they were able to agree upon normally stood agreed: what they could not agree upon would either be reserved for consideration by the foreign ministers or else sent back to the appropriate Committee.

2. The first meeting of the Council lasted for about a month, and was followed by a second meeting—in June and part of July. Opportunity was afforded to the enemy countries to express their views, and in some cases their representatives were heard at the Council table. In this way, the complete drafts of Peace Treaties with each of the five countries were drawn up. The remaining Allied Powers were then invited to a full-scale conference, also at the Luxembourg, which started early in August and went on until late in October. However, this conference was not empowered to take any final decisions: according to the Rules of Procedure which it adopted as its opening act, it could only proceed on the basis of the texts already drawn up by the Council of Foreign Ministers, though of course it was open to any delegation to propose amendments, which would then be carried or rejected by a majority vote. But even where carried, these amendments did not of themselves cause the text as drawn up by the Council of Foreign Ministers to be altered. Their status was simply that of *proposals* for amendment made by the conference to the Council. The upshot was that at the end of the Peace Conference in October, a considerable part of the original texts as drawn up by the Council stood approved

by the Conference, while in respect of the rest, the Conference had adopted a series of proposed amendments which the Council would now have to consider.

3. The Peace Conference then came to an end and never reconvened, and the remainder of the work was done by the Council of Foreign Ministers, meeting for this purpose in New York from early November until January, the foreign ministers themselves leaving about half-way through December. The meetings took place in one of the Tower Rooms of the Waldorf Astoria Hotel. At these meetings, the foreign ministers examined one by one the proposals for amendment to the original text adopted by the Peace Conference and either approved the amendment or rejected it, or possibly adopted some amendment of their own, using the same apparatus of deputies and Committees, etc. By the time the foreign ministers themselves left, complete and final texts had been drawn up, subject to a comparison of the texts in the different languages (French, English, and Russian), in the course of which some further purely drafting alterations were made.

4. These final texts were then opened for signature in Paris. A short signature ceremony took place on 10 February 1947, and the texts were signed by all the Allied Powers that had actually been at war with the five countries concerned.

Japanese Peace Conference, 1951

The Japanese Peace Treaty

5. The procedure adopted for the conclusion of this Treaty was of an even more unorthodox kind than in the case just considered. Some of the preparatory work was done by a body sitting in Washington, consisting of representatives of the principal countries that had been at war with Japan, and called the Far Eastern Commission. However, the actual *raison d'être* of this body was not the conclusion of a Peace Treaty, but the political supervision of the administration of Japan during the occupation period. The first actual drafts of a Peace Treaty were got out by diplomatic correspondence between the United States and United Kingdom governments during the latter part of 1950 and the early part of 1951. There then followed a series of meetings between officials and ministers of these two countries, some of which took place in Washington and some in London, between April and August 1951, at which progressive agreement was reached on the text of the Peace Treaty. Contact with other prospective signatories was maintained, partly by diplomatic correspondence conducted mainly through the State Department in Washington; partly by meetings between the State Department and the embassies of such countries in Washington; and partly by means of similar meetings between these embassies and the British embassy in Washington. In this way, the views of the different countries on the proposed text were ascertained, and progressive alterations were made in the texts to take account of these views. However, at no stage of the proceedings was there any general negotiating conference at which views could be exchanged across the table between all concerned.

6. Eventually, in August, final texts of a Treaty and various ancillary instruments were circulated to all the prospective signatories, and they were invited to attend a meeting at San Francisco which, it was emphasized, would be for the purpose of signing the Peace Treaty and other instruments and of hearing any accompanying declarations or speeches, but which was not intended to be a forum for any negotiations or for proposing alterations in the existing texts.

7. The San Francisco meeting was duly held in the first part of September 1951, in the same buildings that had been utilized for the drafting of the United Nations Charter. Objections to the procedure adopted were voiced by certain countries which did not sign the Treaty. Apart from that, the Treaty and ancillary instruments, as presented, were found to be acceptable, and were signed on 8 September by 26 Allied Powers that had been at war with Japan, and by Japan.

8. This affords a unique example of a Peace Treaty concluded entirely by correspondence, by informal contacts, and by meetings between representatives of one or more interested countries without any general conference other than a meeting for the purpose of signature.

Geneva Conference, 1954

9. This Conference originated in a communiqué[1] of 18 February 1954, issued at the conclusion of a meeting in Berlin of the foreign ministers of the United States (John Foster Dulles), France (Georges Bidault), the United Kingdom (Anthony Eden), and the Soviet Union (Vyacheslav Molotov). The relevant part of the communiqué read as follows:

> *Considering* that the establishment, by peaceful means, of a united and independent Korea would be an important factor in reducing international tension and in restoring peace in other parts of Asia,
>
> *Propose* that a conference of representatives of the United States, France, the United Kingdom, the Union of Soviet Socialist Republics, the Chinese People's Republic, the Republic of Korea, the People's Democratic Republic of Korea and the other countries the armed forces of which participated in the hostilities in Korea, and which desire to attend, shall meet in Geneva on April 26th for the purpose of reaching a peaceful settlement of the Korean question.
>
> *Agree* that the problem of restoring peace in Indo-China will also be discussed at the conference, to which representatives of the United States, France, the United Kingdom, the Union of Soviet Socialist Republics, the Chinese People's Republic and other interested States will be invited.
>
> *It is understood* that neither the invitation to, nor the holding of, the above-mentioned Conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded.

10. The Conference was held in the Palais des Nations from 26 April to 21 July 1954.[2] It virtually became two conferences—one for the Korean question and one for the problem of restoring peace in Indo-China. This division was natural because, apart from the concern of the Four Powers and the People's Republic of China in both problems, they were entirely separate and distinct.

11. On the conclusion of hostilities in 1945, Korea had been temporarily divided along the 38th parallel. In the following years, vain attempts were made by the United Nations to

[1] Documents relating to the meeting of Foreign Ministers, Berlin, 25 January–18 February 1954, Cmd 9080, 180.

[2] See generally Documents relating to the discussion of Korea and Indo-China at the Geneva Conference, Cmd 9186.

bring about the unification of Korea by democratic means, but on 25 June 1950, North Korean troops attacked South Korea. They were opposed by United Nations forces, and in spite of the support of very large numbers of Chinese Communist troops were in the end able to bring about no significant change in the division of Korea at the 38th parallel. Hostilities were ended by the Korean Armistice Agreement signed at Panmunjom on 27 July 1953. The result was a deadlock which neither the United Nations General Assembly nor, in the event, the Geneva Conference was able to break.[3]

12. The Indo-China phase of the Conference opened on 8 May 1954, a short time after the French garrison at Dien Bien Phu fell to the onslaught of the Viet Minh forces. The battle was the culmination of a nationalist and Communist struggle to wrest the Associate States of Vietnam, Laos and Cambodia from the status of protection which France had tried to re-establish after the Second World War. At the time of the Conference, France had, in principle, recognized the independence of the Associate States and the primary task of the Conference was to put an end to hostilities so as to make possible a stable political settlement. The result was the signature of three Agreements on the cessation of hostilities in Cambodia, Laos, and Vietnam, respectively signed in each case by the appropriate military authorities. The conference contented itself with a declaration which, inter alia, took note of the three Agreements. Separate declarations were also made by the representatives of the United States, Cambodia, Laos, and France.[4]

13. The relations between the various governments and the non-recognition of some by others made the seating at the Conference both difficult and interesting. Ostensibly, the seating for the Korean phase followed the English alphabetical order and for the Indo-China phase the French alphabetical order.[5]

14. There was no Secretariat for the Conference as a whole, but the 16 nations who had contributed military forces to the United Nations Command in Korea formed their own Secretariat for the Korean phase of the Conference. A Secretariat on a reduced scale was also maintained, on behalf of the Western Powers and their Indo-Chinese associates, by France and the United Kingdom during the Indo-Chinese phase of the Conference. In both cases, almost all the staff were provided by the United Nations Organization and their services were used to some extent by other delegations as well.

15. The procedure for both phases of the Conference was very informal. There was no voting. The most significant features of the procedure were the provisions relating to languages and the rotation of the chairmanship. For the Korean phase Prince Wan, M Molotov, and Sir Anthony Eden were the chairmen. For the Indo-China Phase Sir Anthony Eden and M Molotov were the chairmen, although at some meetings their places were taken by their deputies.

16. The pattern of the Geneva Conference was reminiscent of many conferences of the eighteenth and nineteenth centuries. It had a character and dignity of its own, which, except

[3] In the years since then, many developments have taken place, leading to the admission of both North Korea and South Korea as members of the United Nations (under the names of Democratic People's Republic of Korea and Republic of Korea, respectively), and both States are now widely recognized by other States and entertain relations with one another.

[4] For the text of the Agreements and declarations see Further Documents relating to the discussion of Indo-China at the Geneva Conference, 16 June–21 July 1954, Cmd 9239.

[5] During the later meetings on Indo-China, tables were arranged to form a continuous hollow square, but the retention of the same order of seating enabled any embarrassing proximities to be avoided.

during the final week, were unruffled by the pressure of drafting treaty texts and voting on numerous clauses and amendments which is typical of conferences in recent times. It aimed at a political settlement not by the production of a single treaty to which all participants might adhere, but by the formal statement of policies and views, the pronouncement of declarations, and the encouragement of agreement between the parties most directly concerned.

International Conference on the Former Yugoslavia, 1992

17. This offers an interesting example of a modern peace-making Conference, with a very special structure and organization designed to meet the complexity of the issues requiring to be settled in the aftermath of the bitter military hostilities that followed the collapse of the former Socialist Federal Republic of Yugoslavia, and to accommodate as well the unusual mixture of States, State-like and other entities, and international bodies who had or assumed an interest in the resolution of these issues.

18. The Conference was set up in August 1992 'to remain in being until a final settlement of the problems of the former Yugoslavia is reached'. It continued in being until the signature of the General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement, in November 1995.[6]

19. The Conference had as its permanent co-chairmen the secretary-general of the United Nations and the head of state or head of government of the country holding for the time being the presidency of the European Union (EU). Its main work was controlled by its Steering Committee, again under the co-chairmanship of the representatives of the permanent Co-Chairmen of the Conference, Cyrus Vance representing the UN and Lord (David) Owen representing the EU, together with representatives of: the states which composed the so-called 'troika' of the EU and that of the CSCE;[7] the five Permanent Members of the UN Security Council; the Organization of the Islamic Conference, and neighbouring states. A collateral agreement was subsequently reached under which one of the neighbouring state representations would rotate between Italy and Greece, and the other would be drawn from the non-EU Member States rotating in English alphabetical order beginning with Romania.

20. The Steering Committee was to be in continuous session at the Office of the United Nations in Geneva, as were its six Working Groups,[8] and was to be assisted by an Arbitration Commission. They would be serviced by a small secretariat provided jointly by the UN and the EU, and the costs would be shared amongst the participants on a scale approved half-yearly by the Steering Committee.

21. The final phase of the negotiation over Bosnia and Herzegovina took place, under conditions of strict security (and total exclusion of the news media), at the Wright-Patterson Base of the US Air Force near Dayton, Ohio.

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[6] Numerous documents of the Conference are published in *The International Conference on the Former Yugoslavia: Official Papers* (ed Ramcharan) (The Hague, 1997).

[7] ie the current, former, and next following Presidencies of those bodies; the term is of course borrowed from the Russian for a sleigh or other vehicle drawn by three horses abreast.

[8] Dealing respectively with: Bosnia and Herzegovina (cessation of hostilities and a constitutional settlement); humanitarian relief, including refugees; ethnic minorities; economic issues; and confidence- and security-building.

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APPENDIX III

Vienna Convention on Diplomatic Relations Done at Vienna on 18 April 1961

The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

(a) The "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;
(b) The "members of the mission" are the head of the mission and the members of the staff of the mission;
(c) The "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
(d) The "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;
(e) A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;
(f) The "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;
(g) The "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;
(h) A "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;

(i) The "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. The functions of a diplomatic mission consist, inter alia, in:
   (a) Representing the sending State in the receiving State;
   (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
   (c) Negotiating with the Government of the receiving State;
   (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
   (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.
2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a chargé d'affaires ad interim in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.
2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
   (a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
   (b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
   (c) The arrival and final departure of private servants in the employ of persons referred to in subparagraph (*a*) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
   (d) The engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.
2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.
2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:
   (a) That of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
   (b) That of envoys, ministers and internuncios accredited to Heads of State;
   (c) That of chargés d'affaires accredited to Ministers for Foreign Affairs.
2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with article 13.
2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.
3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions a chargé d'affaires ad interim shall act provisionally as head of the mission. The name of the chargé d'affaires ad interim shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the

sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy person inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
   (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
   (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
   (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
2. A diplomatic agent is not obliged to give evidence as a witness.
3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

Article 33

1. Subject to the provisions of paragraph 3 of this article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:
   (a) That they are not nationals of or permanently resident in the receiving State; and
   (b) That they are covered by the social security provisions which may be in force in the sending State or a third State.
3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of article 39;
(d) Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
(e) Charges levied for specific services rendered;
(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) Articles for the official use of the mission;
   (b) Articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to

acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.
3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit, the same inviolability and protection as the receiving State is bound to accord.
4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to force majeure.

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.
2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.
3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Article 42

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, inter alia:

(a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
(b) On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
   (a) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
   (b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in article 48:

(a) Of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with articles 48, 49 and 50;
(b) Of the date on which the present Convention will enter into force, in accordance with article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in article 48.

In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Done at Vienna this eighteenth day of April one thousand nine hundred and sixty-one.

APPENDIX IV

Vienna Convention on Consular Relations Done at Vienna on 24 April 1963

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

Definitions

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
   (a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
   (b) "consular district" means the area assigned to a consular post for the exercise of consular functions;
   (c) "head of consular post" means the person charged with the duty of acting in that capacity;
   (d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
   (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
   (f) "member of the service staff" means any person employed in the domestic service of a consular post;
   (g) "members of the consular post" means consular officers, consular employees and members of the service staff;

(h) "members of the consular staff" means consular officers, other than the head of a consular post, consular employees and members of the service staff;
(i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;
(j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;
(k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.

2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers, the provisions of Chapter III govern consular posts headed by honorary consular officers.
3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by article 71 of the present Convention.

Chapter I
Consular Relations in General

Section I Establishment and Conduct of Consular Relations

Article 2

Establishment of consular relations

1. The establishment of consular relations between States takes place by mutual consent.
2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.
3. The severance of diplomatic relations shall not ipso facto involve the severance of consular relations.

Article 3

Exercise of consular functions

Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

Article 4

Establishment of a consular post

1. A consular post may be established in the territory of the receiving State only with that State's consent.
2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.
3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.

4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.
5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 5

Consular functions

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
(j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
(l) extending assistance to vessels and aircraft mentioned in subparagraph (*k*) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and

stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 6

Exercise of consular functions outside the consular district

A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.

Article 7

Exercise of consular functions in a third State

The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8

Exercise of consular functions on behalf of a third State

Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

Article 9

Classes of heads of consular posts

1. Heads of consular posts are divided into four classes, namely
   (a) consuls-general;
   (b) consuls;
   (c) vice-consuls;
   (d) consular agents.
2. Paragraph 1 of this article in no way restricts the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts.

Article 10

Appointment and admission of heads of consular posts

1. Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State.
2. Subject to the provisions of the present Convention, the formalities for the appointment and for the admission of the head of a consular post are determined by the laws, regulations and usages of the sending State and of the receiving State respectively.

Article 11

The consular commission or notification of appointment

1. The head of a consular post shall be provided by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post.
2. The sending State shall transmit the commission or similar instrument through the diplomatic or other appropriate channel to the Government of the State in whose territory the head of a consular post is to exercise his functions.
3. If the receiving State agrees, the sending State may, instead of a commission or similar instrument, send to the receiving State a notification containing the particulars required by paragraph 1 of this article.

Article 12

The exequatur

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an *exequatur*, whatever the form of this authorization.
2. A State which refused to grant an *exequatur* is not obliged to give to the sending State reasons for such refusal.
3. Subject to the provisions of articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an *exequatur*.

Article 13

Provisional admission of heads of consular posts

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, the provisions of the present Convention shall apply.

Article 14

Notification to the authorities of the consular district

As soon as the head of a consular post is admitted even provisionally to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.

Article 15

Temporary exercise of the functions of the head of a consular post

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending

State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.

3. The competent authorities of the receiving State shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.
4. When, in the circumstances referred to in paragraph 1 of this article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

Article 16

Precedence as between heads of consular posts

1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.
2. If, however, the head of a consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the *exequatur*.
3. The order of precedence as between two or more heads of consular posts who obtained the *exequatur* or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments or the notifications referred to in paragraph 3 of article 11 were presented to the receiving State.
4. Acting heads of posts shall rank after all heads of consular posts and, as between themselves, they shall rank according to the dates on which they assumed their functions as acting heads of posts as indicated in the notifications given under paragraph 2 of article 15.
5. Honorary consular officers who are heads of consular posts shall rank in each class after career heads of consular posts, in the order and according to the rules laid down in the foregoing paragraphs.
6. Heads of consular posts shall have precedence over consular officers not having that status.

Article 17

Performance of diplomatic acts by consular officers

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.
2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any intergovernmental organization. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by

customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

Article 18

Appointment of the same person by two or more States as a consular officer

Two or more States may, with the consent of the receiving State, appoint the same person as a consular officer in that State.

Article 19

Appointment of members of consular staff

1. Subject to the provisions of articles 20, 22 and 23, the sending State may freely appoint the members of the consular staff.
2. The full name, category and class of all consular officers, other than the head of a consular post, shall be notified by the sending State to the receiving State in sufficient time for the receiving State, if it so wishes, to exercise its rights under paragraph 3 of article 23.
3. The sending State may, if required by its laws and regulations, request the receiving State to grant an *exequatur* to a consular officer other than the head of a consular post.
4. The receiving State may, if required by its laws and regulations, grant an *exequatur* to a consular officer other than the head of a consular post.

Article 20

Size of the consular staff

In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular consular post.

Article 21

Precedence as between consular officers of a consular post

The order of precedence as between the consular officers of a consular post and any change thereof shall be notified by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Article 22

Nationality of consular officers

1. Consular officers should, in principle, have the nationality of the sending State.
2. Consular officers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 23

Persons declared "non grata"

1. The receiving State may at any time notify the sending State that a consular officer is persona non grata or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.
2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving State may, as the case may be, either withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff.
3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.
4. In the cases mentioned in paragraphs 1 and 3 of this article, the receiving State is not obliged to give to the sending State reasons for its decision.

Article 24

Notification to the receiving State of appointments, arrivals and departures

1. The Ministry for Foreign Affairs of the receiving State or the authority designated by that Ministry shall be notified of:
   (a) the appointment of members of a consular post, their arrival after appointment to the consular post, their final departure or the termination of their functions and any other changes affecting their status that may occur in the course of their service with the consular post;
   (b) the arrival and final departure of a person belonging to the family of a member of a consular post forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;
   (c) the arrival and final departure of members of the private staff and, where appropriate, the termination of their service as such;
   (d) the engagement and discharge of persons resident in the receiving State as members of a consular post or as members of the private staff entitled to privileges and immunities.
2. When possible, prior notification of arrival and final departure shall also be given.

Section ii End of Consular Functions

Article 25

Termination of the functions of a member of a consular post

The functions of a member of a consular post shall come to an end, inter alia:

(a) on notification by the sending State to the receiving State that his functions have come to an end;
(b) on withdrawal of the *exequatur*;
(c) on notification by the receiving State to the sending State that the receiving State has ceased to consider him as a member of the consular staff.

Article 26

Departure from the territory of the receiving State

The receiving State shall, even in case of armed conflict, grant to members of the consular post and members of the private staff, other than nationals of the receiving State, and to members of their families forming part of their households irrespective of nationality, the necessary time and facilities to enable them to prepare their departure and to leave at the earliest possible moment after the termination of the functions of the members concerned. In particular, it shall, in case of need, place at their disposal the necessary means of transport for themselves and their property other than property acquired in the receiving State the export of which is prohibited at the time of departure.

Article 27

Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances

1. In the event of the severance of consular relations between two States:
   (a) the receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives;
   (b) the sending State may entrust the custody of the consular premises, together with the property contained therein and the consular archives, to a third State acceptable to the receiving State;
   (c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.
2. In the event of the temporary or permanent closure of a consular post, the provisions of subparagraph (*a*) of paragraph 1 of this article shall apply. In addition,
   (a) if the sending State, although not represented in the receiving State by a diplomatic mission, has another consular post in the territory of that State, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving State, with the exercise of consular functions in the district of that consular post; or
   (b) if the sending State has no diplomatic mission and no other consular post in the receiving State, the provisions of subparagraphs (*b*) and (*c*) of paragraph 1 of this article shall apply.

Chapter II

Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post

Section I Facilities, Privileges and Immunities Relating to a Consular Post

Article 28

Facilities for the work of the consular post

The receiving State shall accord full facilities for the performance of the functions of the consular post.

Article 29

Use of national flag and coat-of-arms

1. The sending State shall have the right to the use of its national flag and coat-of-arms in the receiving State in accordance with the provisions of this article.
2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.
3. In the exercise of the right accorded by this article regard shall be had to the laws, regulations and usages of the receiving State.

Article 30

Accommodation

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending State of premises necessary for its consular post or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

Article 31

Inviolability of the consular premises

1. Consular premises shall be inviolable to the extent provided in this article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
3. Subject to the provisions of paragraph 2 of this article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.
4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 32

Exemption from taxation of consular premises

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

Article 33

Inviolability of the consular archives and documents

The consular archives and documents shall be inviolable at all times and wherever they may be.

Article 34

Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure freedom of movement and travel in its territory to all members of the consular post.

Article 35

Freedom of communication

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.
3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.
4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.
5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.
7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
   (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
   (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Article 37

Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

(a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;
(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;
(c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

Article 38

Communication with the authorities of the receiving State

In the exercise of their functions, consular officers may address:

(a) the competent local authorities of their consular district;

(b) the competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.

Article 39

Consular fees and charges

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.
2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

Section II Facilities, Privileges and Immunities Relating to Career Consular Officers and Other Members of a Consular Post

Article 40

Protection of consular officers

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41

Personal inviolability of consular officers

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.
2. Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42

Notification of arrest, detention or prosecution

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Article 43

Immunity from jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
2. The provisions of paragraph 1 of this article shall not, however, apply in respect of a civil action either:
   (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
   (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44

Liability to give evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.
2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.
3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45

Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in articles 41, 43 and 44.
2. The waiver shall in all cases be express, except as provided in paragraph 3 of this article, and shall be communicated to the receiving State in writing.
3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.
4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Article 46

Exemption from registration of aliens and residence permits

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all obligations under the laws and

regulations of the receiving State in regard to the registration of aliens and residence permits.

2. The provisions of paragraph 1 of this article shall not, however, apply to any consular employee who is not a permanent employee of the sending State or who carries on any private gainful occupation in the receiving State or to any member of the family of any such employee.

Article 47

Exemption from work permits

1. Members of the consular post shall, with respect to services rendered for the sending State, be exempt from any obligations in regard to work permits imposed by the laws and regulations of the receiving State concerning the employment of foreign labour.
2. Members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving State, be exempt from the obligations referred to in paragraph 1 of this article.

Article 48

Social security exemption

1. Subject to the provisions of paragraph 3 of this article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:
   (a) that they are not nationals of or permanently resident in the receiving State; and
   (b) that they are covered by the social security provisions which are in force in the sending State or a third State.
3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.
4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Article 49

Exemption from taxation

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:
   (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
   (b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of article 32;
   (c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (*b*) of article 51;

(d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.
3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the laws and regulations of that State impose upon employers concerning the levying of income tax.

Article 50

Exemption from customs duties and inspection

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) articles for the official use of the consular post;
   (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.
2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this article in respect of articles imported at the time of first installation.
3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in subparagraph (*b*) of paragraph 1 of this article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

Article 51

Estate of a member of the consular post or of a member of his family

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:

(a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
(b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

Article 52

Exemption from personal services and contributions

The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 53

Beginning and end of consular privileges and immunities

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.
2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.
3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.
4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.
5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

Article 54

Obligations of third States

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.
3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.
4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to force majeure.

Article 55

Respect for the laws and regulations of the receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State.
2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.
3. The provisions of paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

Article 56

Insurance against third party risks

Members of the consular post shall comply with any requirements imposed by the laws and regulations of the receiving State, in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

Article 57

Special provisions concerning private gainful occupation

1. Career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving State.
2. Privileges and immunities provided in this chapter shall not be accorded:
   (a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;
   (b) to members of the family of a person referred to in subparagraph (*a*) of this paragraph or to members of his private staff;
   (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

Chapter III
Regime Relating to Honorary Consular Officers and Consular Posts Headed By Such Officers

Article 58

General provisions relating to facilities, privileges and immunities

1. Articles 28, 29, 30, 34, 35, 36, 37, 38 and 39, paragraph 3 of article 54 and paragraphs 2 and 3 of article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by articles 59, 60, 61 and 62.
2. Articles 42 and 43, paragraph 3 of article 44, articles 45 and 53 and paragraph 1 of article 55 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by articles 63, 64, 65, 66 and 67.
3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.
4. The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.

Article 59

Protection of the consular premises

The receiving State shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Article 60

Exemption from taxation of consular premises

1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph l of this article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

Article 61

Inviolability of consular archives and documents

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

Article 62

Exemption from customs duties

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of a consular post headed by an honorary consular officer: coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

Article 63

Criminal proceedings

If criminal proceedings are instituted against an honorary consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except when he is under arrest or detention, in a manner which will hamper the exercise of consular functions as little as possible. When it has become necessary to detain an honorary consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 64

Protection of honorary consular officers

The receiving State is under a duty to accord to an honorary consular officer such protection as may be required by reason of his official position.

Article 65

Exemption from registration of aliens and residence permits

Honorary consular officers, with the exception of those who carry on for personal profit any professional or commercial activity in the receiving State, shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

Article 66

Exemption from taxation

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

Article 67

Exemption from personal services and contributions

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 68

Optional character of the institution of honorary consular officers

Each State is free to decide whether it will appoint or receive honorary consular officers.

Chapter IV
General Provisions

Article 69

Consular agents who are not heads of consular posts

1. Each State is free to decide whether it will establish or admit consular agencies conducted by consular agents not designated as heads of consular post by the sending State.
2. The conditions under which the consular agencies referred to in paragraph 1 of this article may carry on their activities and the privileges and immunities which may be enjoyed by the consular agents in charge of them shall be determined by agreement between the sending State and the receiving State.

Article 70

Exercise of consular functions by diplomatic missions

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.
2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.
3. In the exercise of consular functions a diplomatic mission may address:
   (a) the local authorities of the consular district;
   (b) the central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by relevant international agreements.
4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this article shall continue to be governed by the rules of international law concerning diplomatic relations.

Article 71

Nationals or permanent residents of the receiving State

1. Except insofar as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privileges provided in paragraph 3 of article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.

2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this article, shall enjoy facilities, privileges and immunities only insofar as these are granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only insofar as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

Article 72

Non-discrimination

1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
   (a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State;
   (b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 73

Relationship between the present Convention and other international agreements

1. The provisions of the present Convention shall not affect other international agreements in force as between States Parties to them.
2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

Chapter V
Final Provisions

Article 74

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article 75

Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 76

Accession

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 74. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 77

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 78

Notifications by the Secretary-General

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in article 74:

(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with articles 74, 75 and 76;
(b) of the date on which the present Convention will enter into force, in accordance with article 77.

Article 79

Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in article 74.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this twenty-fourth day of April, one thousand nine hundred and sixty-three.

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APPENDIX V

Vienna Convention on the Law of Treaties Done at Vienna on 23 May 1969

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

Part I
Introduction

Article 1

Scope of the present Convention

The present Convention applies to treaties between States.

Article 2

Use of terms

1. For the purposes of the present Convention:
   (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
   (b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
   (c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;
   (d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
   (e) "negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;
   (f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;
   (g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;
   (h) "third State" means a State not a party to the treaty;
   (i) "international organization" means an intergovernmental organization.
2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;
(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Part II
Conclusion and Entry into Force of Treaties

Section 1 Conclusion of Treaties

Article 6

Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
   (a) he produces appropriate full powers; or
   (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
   (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
   (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11

Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
   (a) the treaty provides that signature shall have that effect;
   (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
   (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
2. For the purposes of paragraph 1:
   (a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
   (b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13

Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or
(b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Article 14

Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:
   (a) the treaty provides for such consent to be expressed by means of ratification;
   (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
   (c) the representative of the State has signed the treaty subject to ratification; or
   (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15

Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;
(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16

Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;
(b) their deposit with the depositary; or
(c) their notification to the contracting States or to the depositary, if so agreed.

Article 17

Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.
2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Section 2 Reservations

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
   (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
   (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
   (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal elects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
   (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
   (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
   (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
   (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Section 3 Entry into Force and Provisional, Application of Treaties

Article 24

Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Part III
Observance, Application and Interpretation of Treaties

Section 1 Observance of treaties

Article 26

"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Section 2 Application of treaties

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
   (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
   (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Section 3 Interpretation of treaties

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Section 4 Treaties and third states

Article 34

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35

Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36

Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.
2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38

Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

Part iv
Amendment and Modification of Treaties

Article 39

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

Article 40

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
   (a) the decision as to the action to be taken in regard to such proposal;
   (b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.
5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
   (a) be considered as a party to the treaty as amended; and
   (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   (a) the possibility of such a modification is provided for by the treaty; or
   (b) the modification in question is not prohibited by the treaty and:
      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Part V
Invalidity, Termination and Suspension of the Operation of Treaties

Section 1 General Provisions

Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.
2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
   (a) the said clauses are separable from the remainder of the treaty with regard to their application;
   (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
   (c) continued performance of the remainder of the treaty would not be unjust.
4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.
5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Section 2 Invalidity of Treaties

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47

Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.
3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49

Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51

Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Section 3 Termination and Suspension of the Operation of Treaties

Article 54

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 55

Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
   (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
   (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57

Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 58

Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:
   (a) the possibility of such a suspension is provided for by the treaty; or
   (b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
   (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
   (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
      (i) in the relations between themselves and the defaulting State; or
      (ii) as between all the parties;
   (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
   (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
   (a) a repudiation of the treaty not sanctioned by the present Convention; or
   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
   (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
   (a) if the treaty establishes a boundary; or
   (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64

Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Section 4 Procedure

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.
2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

Section 5 Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.
2. If acts have nevertheless been performed in reliance on such a treaty:
   (a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
   (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.
3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.
4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:
   (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
   (b) bring their mutual relations into conformity with the peremptory norm of general international law.
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
   (a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:
   (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
   (b) does not otherwise affect the legal relations between the parties established by the treaty.
2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Part VI
Miscellaneous Provisions

Article 73

Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Part VII
Depositaries, Notifications, Corrections and Registration

Article 76

Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.
2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77

Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:
   (a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
   (b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
   (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
   (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
   (e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
   (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
   (g) registering the treaty with the Secretariat of the United Nations;
   (h) performing the functions specified in other provisions of the present Convention.
2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

   (a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;
(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:
   (a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
   (b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
   (c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.
2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:
   (a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
   (b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.
3. The rules in paragraphs I and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.
4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.
5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.
6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.
2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Part VIII
Final Provisions

Article 81

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82

Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83

Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85

Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.
2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:
   The State or States constituting one of the parties to the dispute shall appoint:
   (a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
   (b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.
4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.
5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.
6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.
7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

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